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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

05-44481-rdd

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IN RE:

DELPHI CORPORATION, et al.,

Debtor.

- - - - -x

February 10, 2006

2:10 PM

United States Custom House

One Bowling Green

New York, New York

B e f o r e :

HON. ROBERT D. DRAIN, US BANKRUPTCY JUDGE

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 HEARING re Motion to Approve Motion for an
3 Order Under 11 U.S.C. Sections 363(b) and
4 365(a) and Fed. R. Bankr. P. 9019 Approving
5 Procedures to Assume Certain Amended and
6 Restated Sole Source Supplier Agreements

7
8 HEARING re Motion to Authorize Motion for
9 Order Under Sections 105 and 363 Authorizing
10 the Debtors to Implement a Key Employee
11 Compensation Program

12
13 HEARING re Objection to Motion and Memorandum
14 of Law in Support of Objection of IBEW Local
15 63 and IAM District 10 to Motion for Order
16 Authorizing Debtors to Implement a Key
17 Employee Compensation Plan

18
19 HEARING re Objection to Motion and Memorandum
20 of Law of International Union of Operating
21 Engineers Local Union Nos. 18, 101 and 832 to
22 Debtor's Motion for an Order Authorizing the
23 Debtors to Implement a Key Employee
24 Compensation Program

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1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 HEARING re Motion to Authorize Motion for
3 Order Under Sections 105 and 363 Authorizing
4 the Debtors to Implement a Key Employee
5 Compensation Program

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21 Transcribed By:

22 Pnina Eilberg

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3 P R O C E E D I N G S

4 THE COURT: Be seated.

5 MR. BUTLER: Your Honor, good
6 afternoon. My name is Jack Butler. I
7 am from the law firm of Skadden, Arps,
8 Slate, Meagher & Flom, LLP. I'm here
9 with my partners David Springer and
10 Kayalyn Marafioti for this specially set
11 hearing on a motion for order under 11
12 USC 105 in the 363, to authorize the
13 debtors to implement a Key Employee
14 Compensation Program, originally filed
15 in October of 2005, at docket number
16 213. Your Honor, by agreement with the
17 creditors committee entered into in
18 December of 2005, the debtors agreed to
19 adjourn to the July 27th, 2006 hearing.
20 All aspects of the KECP motion relating
21 to annual incentive plans after June
22 30th of 2006, relating to emergence cash
23 awards, and relating to emergency --
24 emergence equity awards. We have agreed
25 to proceed only with the annual

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2 incentive plan for the period from
3 October 8th through June 30th of 2006.
4 The debtors previously dealt with an
5 aspect of the pre-petition long-term
6 incentive plan and with the severance
7 program as part of the human capital
8 obligations order, which is a final
9 order of the Court, which also dealt
10 with the payment of full performance of
11 payment obligations to the debtors,
12 46,000 member domestic human capital
13 work force. And the debtors also, Your
14 Honor, as part of this program, have
15 cancelled the pre-petition long-term
16 incentive program, other than for a
17 limited performance program dealt with
18 under the human capital obligations
19 order. And also cancelled a pre-
20 petition retention program, or stay-for-
21 pay program, that had been approved back
22 in February of 2005. Your Honor, so the
23 only matter that is before the Court
24 today, is the annual incentive plan for
25 the period covering the first nine

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2 months of the debtors' cases. As part
3 of our agreements with the unsecured
4 creditors committee, we have agreed to
5 forgo the program for the fourth quarter
6 of 2005. That period's obviously behind
7 us now. It was not behind us when the
8 motion was filed in October of 2005, but
9 as the time has marched on, and the
10 debtors have adjourned these matters for
11 a period of four months to work through
12 the mechanics and the form and substance
13 of the program with the creditors
14 committee, it was agreed that the
15 program would cover only the period
16 January 1 through June 30th of this
17 year. Your Honor, the program that is
18 before the Court at target performance
19 has a pool of just under 21 million
20 dollars, with no more than about 5.7
21 million of that available for the 22 or
22 23 most senior officers at the company,
23 that are called - that are comprised the
24 Delphi strategy board, with the
25 exception of Mr. Miller, our chief

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2 executive officer, who is in court
3 today, who has voluntarily reduced his
4 compensation, effective January 1st, to
5 a dollar a year and has declined
6 participation in this program. Your
7 Honor, to put this in perspective, we're
8 here before the Court on a summary
9 hearing regarding the section 363 use of
10 estate property for what the debtors
11 believe, at least as it relates to this
12 portion of the KECP, is an ordinary
13 course program, and just to put it in
14 perspective, the document that's blown
15 up on the board which is also part of
16 Exhibit 1, makes clear, from the
17 debtors' perspective and the testimony
18 will make clear as we move forward, that
19 the annual incentive program, the wedge
20 of the pie that is yellow, is one of
21 four elements of basic compensation that
22 has been part of Delphi's historic cash
23 structure -- incentive structure and
24 compensation structure, for it's
25 executives world wide, since the spin

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2 off from General Motors. There are four
3 pieces. There's a salary amount, there
4 are benefits, there's an annual
5 incentive opportunity and there's a
6 long-term incentive opportunity. And,
7 that comprises the unitary compensation
8 structure for the company. From
9 October 8th of this year, through today,
10 the debtors have been providing their
11 executives only salary and benefits, but
12 not providing any of the other programs,
13 the annual incentive program or the
14 long-term incentive program. And so,
15 there has been two of the four pieces of
16 the puzzle that are part of the unitary
17 program, have, in fact, been unavailable
18 for the last 120 days. And as the
19 testimony will show, there's been a
20 competitive shortfall of that. What we
21 are here today to talk about is only one
22 additional piece of the pie, this third
23 piece dealing with annual incentive
24 opportunity and even if we are able to
25 prevail on our motion today, because we

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2 put off the balance of the KECP to
3 address the long-term incentive issues,
4 the work force -- the executive work
5 force, will be operating on something
6 like two thirds of their basic program,
7 that's been the basic program since the
8 debtors became a public company years
9 ago. And that's just, Your Honor, the
10 summary of what we're here to talk about
11 today. In reviewing the objectives and
12 the evidence, we have made some progress
13 and I'd like to report to the Court on,
14 if I may.

15 THE COURT: Okay.

16 MR. BUTLER: Your Honor, there
17 are, before the Court today, 10
18 objections to be dealt with. There has
19 been one objection that was withdrawn as
20 it relates to the AIP, the pre-
21 petitioned bank group, which had filed
22 their objection at docket number 1157,
23 had withdrawn their objection to the AIP
24 that's before the Court today at docket
25 number 2227. In addition, Your Honor,

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2 there are two unions; I'm just going to
3 run through the other objections. There
4 are five objections that come from the
5 creditors committee and four of its
6 members. There are three other unions
7 that have objected and then there is an
8 objection from the lead plaintiffs in
9 the securities litigation and from the
10 United States Trustee. Addressing the
11 order of the objectors, there has been
12 an agreement, that the objectors in
13 dealing with the evidence to glean
14 today, that the first objector that will
15 deal matters will be the IUECWA. Their
16 objection is filed at docket number 1164
17 and they will be the first of the
18 objectors to present today, and they
19 have also intend to present evidence in
20 the form of Henry Riker who has
21 submitted a declaration at docket number
22 1164, and a supplemental declaration at
23 docket number 2223. The second, in the
24 order of objectors dealing with matters,
25 will be the UAW. Their objection is at

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2 docket number 1135 and they have also
3 filed a declaration at that docket
4 number in support of their objection.
5 The third objector will be the United
6 Steel Workers, who have filed their
7 objection at docket number 1134. They
8 have also a declarant and that is Mark
9 Shaw at docket number 2054. Those are
10 the only three of the objections, Your
11 Honor that have, actually, attest
12 declarations to go in today.

13 THE COURT: Do you contemplate
14 cross examination of those individuals?

15 MR. BUTLER: Very limited, Your
16 Honor, and they are present in the court
17 room today.

18 THE COURT: Okay.

19 MR. BUTLER: The fourth
20 objector would be Wilmington Trust
21 Company. Their objection is at docket
22 number 1133. The fifth objector would
23 be the lead plaintiffs. Their
24 document's at docket number 1161. The
25 sixth objector, if they choose to

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2 present anything, would be the Pension
3 Benefit Guarantee Corporation, another
4 member of the committee, and they're at
5 docket number 1141. And, finally, the
6 last objector would be the Official
7 Committee of Unsecured Creditors at
8 docket number 2099. And the United
9 States Trustee, obviously, is here by
10 Miss Leonhard, to participate as well.
11 Their objection is at docket number
12 1288. We've been advised that -- by
13 counsel to the IBEW, which filed an
14 objection at 1156 and by the IUOE which
15 filed an objection 1159 that they do not
16 have any plans to formally participate
17 in this afternoon's hearing. Your
18 Honor, there is a joint exhibit book,
19 and there have been stipulations with
20 respect to the evidence. I'd like to
21 present those exhibit books at this
22 time.

23 THE COURT: Okay.

24 MR. BUTLER: Your Honor, there
25 are 37 exhibits in the exhibit book.

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2 There's an agreement that Exhibit 1
3 would be admitted for -- as a
4 demonstrative exhibit only. There are
5 no objections to Exhibits 2 through 25.
6 The debtors have an objection to Exhibit
7 26, which is the KECP participants'
8 designation by the lead plaintiffs. The
9 debtors have a hearsay objection to
10 Exhibit 27. Exhibits 28 and 29 have
11 been withdrawn. And, the deposition
12 testimony designates in 31 through 33
13 are coming in, Your Honor, with an
14 agreement that the designators, the UAW
15 and the IUE would not have an
16 opportunity to cross examine Mr. Weber,
17 Mr. Bogdnavich and Mr. Opie, but instead
18 would rely on their designations from
19 the depositions. And, but they did
20 reserve the right to re-cross with
21 respect to any re-direct that I may
22 offer.

23 THE COURT: Okay.

24 MR. BUTLER: So with that in
25 mind, Your Honor, I'd like to move the

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2 admission of documents Exhibits 1
3 through 25, and 30 through 37.

4 THE COURT: Okay. I assume
5 there are no objections, in light of
6 what we've just stated, so I'll admit
7 them.

8 MR. BUTLER: Thank you, Your
9 Honor. Your Honor, in connection with
10 the -- the order, the line of testimony,
11 and there have been meet and confers
12 held in this case in a variety of
13 information that has been exchanged in
14 connection with this, the direct
15 examination for each of the six
16 witnesses, the three for the debtors and
17 the three for the objectors, is
18 proceeding by declaration and
19 supplemental declaration subject to
20 cross examination. And, the order would
21 be first, the debtors will offer Mr.
22 Webber's declaration, both his principal
23 and supplemental declarations. Then the
24 declaration of the debtors' compensation
25 consultant, Nick Bogdnavich. Then the

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2 declaration of the debtors' lead
3 independent director, Mr. John Opie.
4 That would be followed, then, after
5 we've completed the debtors' declarants;
6 we'll then be dealing with the
7 declarations that are being offered by
8 the objectors, presumably in the same
9 order then, that we dealt with them.
10 The first one would be the principal
11 declaration and supplemental declaration
12 of Henry Riker on behalf of the IUE.
13 The second declaration for the objectors
14 would be the declaration of Mr. Steve
15 Grandstaff on behalf the UAW, and the
16 third declarant would be the declaration
17 of Mr. Mark Shaw on behalf of the United
18 Steel Workers. And, we plan brief cross
19 examinations of those witnesses. Your
20 Honor, upon the completion of that, that
21 should complete the evidentiary record
22 and we'll deal with the remaining
23 exhibits at that time. And then we ask
24 Your Honor to move to close the record
25 and make that motion before the Court.

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2 THE COURT: Okay.

3 MR. BUTLER: If that's
4 appropriate to proceed, we'll proceed in
5 that fashion.

6 THE COURT: That sounds fine.

7 MR. BUTLER: Your Honor, I then
8 would like to begin the record today by
9 offering in, they've already been
10 admitted into evidence, these are the
11 declarations, and I should have made the
12 point when I moved their admission,
13 obviously, and I think it goes without
14 saying but I'll say it, the declarations
15 15 through 22nd, Your Honor, moved into
16 evidence subject to cross and re-cross
17 and re-direct that we are planning to
18 do. With that in mind, I'd like to, at
19 this point, offer for cross examination
20 Mark R. Webber, and with respect to his
21 declarations that have been admitted
22 into evidence as Exhibits 15 and 16.

23 THE COURT: Okay. If you could
24 take the stand up here Mr. Webber. Just
25 speak loudly please.

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2 MR. WEBBER: Speak loudly.

3 (Witness is duly sworn.)

4 THE COURT: So, I forget which
5 union we're doing first, but --

6 MR. BUTLER: IUE I believe,
7 number one.

8 MR. KENNEDY: No, the IUE had
9 indicated by the introduction -- Your
10 Honor, my name is Tom Kennedy, I
11 represent the IUE. By the introduction
12 of the designated portions of Mr.
13 Webber's deposition, we've agreed, as a
14 consensual matter, to not burden the
15 Court with further cross examination.

16 THE COURT: All right. Very
17 well.

18 MR. BUTLER: That would be true
19 for the UAW, I believe.

20 MS. LEONHARD: It would, Your
21 Honor. Thank you.

22 THE COURT: Okay.

23 MR. BUTLER: That takes us to
24 the United Steel Workers.

25 MR. PETERSON: Lowell Peterson,

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2 for the Steel Workers, we have no
3 questions at this time, subject to
4 reserving the right to re-cross.

5 THE COURT: Okay.

6 MR. BUTLER: Wilmington Trust.

7 MS. LEONHARD: We don't have
8 any questions at this time.

9 MR. BUTLER: Lead plaintiffs.

10 MR. BECKWORTH: With the
11 Court's permission we do have a few
12 questions.

13 THE COURT: Fine.

14 MR. BECKWORTH: Would it please
15 the Court, Your Honor, my name is Brad
16 Beckworth. I'm with the law firm Nix,
17 Patterson and Roche, from Daingerfield,
18 Texas. I represent the Teacher's
19 Retirement System for the state of
20 Oklahoma, the Public Employees
21 Retirement System for the state of
22 Mississippi, ABP, which is the National
23 Pension Fund of the Netherlands and also
24 Refesem which is a mutual fund
25 management company in Vienna. We have,

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2 I guess, commonly been referred to as a
3 securities lead plaintiffs in this case.
4 With that, I'd have a few questions for
5 Mr. Webber, if it pleases the Court.

6 THE COURT: Go ahead.

7 EXAMINATION BY

8 MR. BECKWORTH:

9 Q. Mr. Webber, good afternoon.
10 You had your deposition taken in this case,
11 last week, I believe?

12 A. I did.

13 Q. And, you've also submitted the
14 declaration?

15 A. That's correct.

16 Q. Just to kind of summarize for
17 the Court, what's in your declaration, could
18 you just describe, briefly, what your
19 involvement was on the compensation committee
20 in the process of fashioning the current
21 version of the KECP or AIP that the debtor is
22 asking the Court to approve?

23 A. I'm the secretary of the
24 compensation committee, school rules and
25 facilitator (indiscernible) advisor

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2 (indiscernible) we want to discuss matters

3 (indiscernible) decision --

4 Q. You were involved in both the
5 promulgation and the continued modification of
6 the KECP that we're ultimately here looking at
7 today.

8 A. (Indiscernible.)

9 Q. And you yourself would be an
10 eligible participant under that KECP, is that
11 correct?

12 A. Correct.

13 Q. I would like to ask you a few
14 questions about what the KECP, as it's
15 currently proposed, does, or does not do. Is
16 there a component in the KECP that requires an
17 eligible employee participant to sign any
18 statement that that employee has not been
19 involved or participated in, insider trading
20 in violation in one of the United States
21 securities exchange acts?

22 A. I don't believe
23 (indiscernible).

24 Q. Is there a provision in the
25 current AIP or KECP that eliminates the

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2 ability of an eligible participant to
3 participate if that person is named as a
4 defendant in the securities class action
5 litigation that is pending?

6 THE COURT: Your suit?

7 BY MR. BECKWORTH:

8 Q. Yes, Your Honor, I mean, yes,
9 sir. Okay. Is there any provision in the AIP
10 KECP that's being proposed today that
11 precludes someone from participating if they
12 have been named by the internal committees,
13 audit committee or other investigative
14 committee appointed by the debtor, if that
15 person has been named as someone who acted
16 with dishonesty against the best interest of
17 the company?

18 A. You asked me if there was a
19 provision prohibits participation, if you had
20 been named by the audit committee of the
21 company?

22 Q. Yes or --

23 A. -- dishonesty?

24 Q. -- yes, sir, or any other
25 investigative committee appointed by the

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2 debtor. That would be participation on the
3 front end.

4 A. Okay. I'm trying to run
5 through the prophylactic protections that we
6 have and I'm trying to imagine how that
7 question fits.

8 Q. Maybe I can help you. The
9 current prophylactic measures that are in
10 place have a claw-back provision that deal a
11 standard that will talk about dishonesty.
12 What I'm asking you for now is, is there any
13 front-end eligibility requirement that
14 precludes participation if someone has been
15 named previously by the investigative
16 committees that have been used by the debtor?

17 A. The name?

18 Q. As a person who acted against
19 the best interest of the company or acted
20 dishonestly.

21 A. I don't think that we have a
22 rule.

23 Q. Excuse me?

24 A. I don't think we have rules
25 about --

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2 Q. You don't think they would be
3 on roll. What does that mean?

4 A. I don't think being dishonest
5 --

6 Q. Yes. Do you know if there's
7 anyone?

8 A. I don't know of anyone.

9 Q. Okay. Thank you, that's fine.
10 Finally, there is no provision in KECP that we
11 have now that precludes participation or
12 requires disgorgement of funds that are earned
13 under this program. If someone is found to
14 have acted dishonestly by the court or jury in
15 the securities litigation, that is presently
16 pending against the debtor. Is that correct?

17 A. Your litigation?

18 Q. Yes, sir. Yes, sir.

19 A. Say that one more time.

20 Q. There is no provision that
21 precludes participation or requires forfeiture
22 of any money earned under this KECP of someone
23 who is found to have acted dishonestly against
24 the best interest of the company by the court
25 or the jury in the securities litigation,

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2 pending its outcome. That's correct, isn't
3 it?

4 A. Specifically that?

5 Q. Yes, sir.

6 A. I don't know that specifically
7 that is mentioned.

8 Q. Okay. So to your knowledge,
9 it's not in there. It's okay. I would like
10 to turn to the prophylactic measures that are
11 being proposed by the debtors. Specifically,
12 I'd like to speak to you for a minute about
13 the claw-back procedures. You're familiar
14 with that?

15 A. Yes.

16 Q. Could you tell the judge what
17 that means, what -- in your mind the claw-back
18 procedure?

19 A. There are a number of
20 provisions that would cause escrow funds.
21 However, those funds are in escrow and if they
22 are found to be a payment method for due
23 process to learn how to claw-back.

24 Q. That's basically a forfeiture
25 provision.

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2 A. Colorful.

3 Q. That standard the claw-back
4 provision has component of finding out when
5 someone should have to forfeit. And I
6 believe, in your words, in your deposition,
7 your declaration; it is if someone acted in
8 bad faith against the best interest of the
9 company. If that is found then they would be
10 required to give money back. Is that correct?

11 A. (Indiscernible)

12 MR. BUTLER: Objection. Your
13 Honor, that document speaks for itself.
14 It's in the record. I don't know that
15 we need to have it recited here. It may
16 be, or perhaps we could get the document
17 in front of the Court and in front of
18 Mr. Webber.

19 MR. BECKWORTH: That's fine, or
20 I could just summarize it, it just be a
21 long.

22 THE COURT: That's fair. Well,
23 no, I mean, I don't want you to be
24 putting words in his mouth. If you're
25 going to ask him about the specific

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2 document, you know, if you want
3 clarification of it, then we should
4 refer into the document.

5 MR. BECKWORTH: The
6 prophylactic, can you give me one
7 second, Your Honor; I'll get it.

8 THE COURT: Sure. It's Exhibit
9 5.

10 MR. BECKWORTH: I'm just going
11 to give him a courtesy copy so that he
12 could look at it. May I approach the
13 bench, Your Honor?

14 THE COURT: Yes. Mr. Webber,
15 if you could still speak up a little,
16 because it has to be picked up on the
17 microphone.

18 MR. BECKWORTH: Your Honor, Mr.
19 Butler has informed me it's Exhibit 5 in
20 the big notebook that Your Honor has
21 before you.

22 THE COURT: That's fine.

23 MR. BECKWORTH: It's in the
24 large book; Exhibit 15 and 16 Mr.
25 Webber, we may be able to help you if we

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2 direct your attention to the actual
3 prophylactic.

4 MR. BUTLER: I'm very sorry
5 about this.

6 BY MR. BECKWORTH:

7 Q. Maybe we can do it this way.
8 After you submitted your declaration, the
9 prophylactic measures were amended. Is that
10 correct, that there was a new version put in
11 place?

12 A. I could never remember.

13 Q. Okay. And I would like to
14 talk to you specifically about those and to
15 help you, sir. So, if you will turn to the
16 second page of Exhibit 5 which is the current
17 prophylactic --

18 THE COURT: Are you going to
19 read that for us?

20 BY MR. BECKWORTH:

21 Q. Yes, Your Honor. Yes, sir, I
22 do. Look at the first paragraph on the second
23 page. You are familiar with those
24 prophylactic measures are you not?

25 A. I am.

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2 Q. Now, let me rephrase that
3 question as you look at it. The current claw-
4 back procedure requires forfeiture if the
5 board finds that a person failed to act with
6 good faith and acted against the best interest
7 of the debtor. Is that correct?

8 A. Correct.

9 Q. Is it also true that at the
10 time you gave your declaration there was yet
11 another standard, and that was that if the
12 person was found to have acted with the belief
13 that his conduct was unlawful?

14 A. I believe that is correct.

15 Q. Can you tell us why that other
16 statement was dropped from what is now being
17 proposed to the Court?

18 A. I believe that consultation
19 during discussion.

20 Q. And the debtor has agreed to
21 that phrasing of the claw-back procedure,
22 correct? Sir, do you believe that that is the
23 appropriate standard to be submitted to the
24 Court for forfeiture?

25 A. I believe it is appropriate.

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 Q. It is appropriate? Okay.

3 Fine. Has the debtor determined any objective
4 criteria for what types of conduct would
5 violate that standard?

6 A. No.

7 Q. Can you illuminate that to the
8 Court? Tell us what those are, if there are
9 any?

10 A. We're talking about
11 (indiscernible).

12 Q. Yes, sir.

13 A. If someone (indiscernible) the
14 number of categories that are listed on hand-
15 held, often delete after a due process,
16 determined to be guilty.

17 Q. Determined by who to be
18 guilty?

19 A. By the company.

20 Q. By the company, okay. Would
21 the following of false financial statements be
22 something that would trigger that claw-back if
23 someone was found to be guilty of that?

24 A. Certainly.

25 Q. What about improperly

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 recording loans of money when in fact, it was
3 a sale. What if you improperly recorded a
4 sale if, in fact, it was a loan? What about
5 delaying the timing of the recording of
6 inventory in violation of the company's
7 internal accounting policies and procedures?

8 A. It could be.

9 Q. What about violations of
10 Delphi's code of conduct?

11 A. It could be.

12 Q. Why do you -- just for
13 clarification, you keep saying it could be.
14 What? Why is that the standard you're using?

15 A. (indiscernible) Due process.

16 Q. Does the claw-back procedure
17 afford due process to such employees accused
18 of these things?

19 A. They would go through due
20 process.

21 Q. Can you explain for the Court
22 was is involved in that due process?

23 A. I imagine that would be an
24 investigation on the part of the company, to
25 hear all the evidence and the testimony and a

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 decision would be made.

3 Q. Is that a time consuming or
4 burdensome endeavor by the debtor? Or could
5 it be?

6 A. It could be.

7 Q. Is the employee entitled to be
8 represented by counsel in such a procedure?

9 A. I don't know the answer to
10 that (indiscernible).

11 Q. Under your current standards
12 in place, with dealing with indemnification of
13 an employee and proceedings related to that,
14 is someone entitled to --

15 A. I think they would be, yeah.

16 Q. Okay. And these are based
17 upon the indemnification standard in your by-
18 laws, is that correct?

19 A. I do believe.

20 Q. Okay. So, then the answer
21 would be that if someone were brought through
22 this process, they would be entitled to be
23 represented by counsel.

24 A. Yes.

25 Q. Who would pay for that

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 counsel? We have seen testimony, and I
3 believe your testimony was this as well, that
4 it was the belief in fashioning the KECP that
5 if an employee was currently employed by
6 Delphi then they should be eligible as an
7 executive to participate. Is that correct?

8 MR. BUTLER: Objection. Your
9 Honor, counsel just testified what Mr.
10 Webber testified to. I'd like to know
11 where that testimony is. I'd like you
12 to refer to the deposition or some piece
13 of paper and repeat the question.

14 THE COURT: Well I don't know.
15 I think I remember him saying that in
16 his deposition.

17 MR. BECKWORTH: I'm just trying
18 to move things along. I can ask it more
19 quickly, just trying to get the process
20 rolling.

21 MR. BUTLER: All right. I'll
22 withdraw, Your Honor.

23 BY MR. BECKWORTH:

24 Q. Your Honor, I'll ask it a
25 different way; it should help. Is that true

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 that you on the compensation committee and the
3 others that were on the compensation
4 committee, started with the premise that if a
5 person was still employed as an executive at
6 Delphi, then they would be allowed to
7 participate in this version of the AIP?

8 A. It depends on who you ask.

9 Q. Okay. And was that based in
10 part on the result of findings by the audit
11 committee?

12 A. Yes.

13 Q. And, is it true that the
14 assumption from which you started this process
15 was that if the audit committee had allowed
16 someone to stay on at the company, then they
17 were properly allowed to participate?

18 A. Correct.

19 Q. Are you aware of what standard
20 the audit committee used in determining
21 whether someone should be asked to be
22 separated from employment in the company?

23 A. Not exactly.

24 Q. Was anyone, to your knowledge,
25 involved with the compensation committee in

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 this process, aware of what that culpability
3 standard was, used by the audit committee?

4 A. Can you rephrase that?

5 Q. Sure. To your knowledge,
6 let's go at this way. Who else was on the
7 compensation committee with you that helped
8 decide about this KECP program?

9 A. John Opie

10 Q. In your communication with
11 those individuals and your experience in
12 developing this program, to your knowledge,
13 was anyone aware of what standard the audit
14 committee used in determining whether a
15 person's employment at Delphi should be
16 stopped, terminated?

17 A. I believe, yes.

18 Q. Who?

19 A. Mr. (indiscernible)

20 Q. Did the compensation
21 committee, let's just say you specifically
22 first, make any effort to compare whether the
23 claw-back standard we just talked about, you
24 remember the good faith and best interest of
25 the company, did you make any effort to

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 determine whether that standard was the
3 equivalent of the standard used by the audit
4 committee?

5 A. I did not.

6 Q. For all you know, the audit
7 committee standard could have been much
8 higher.

9 A. Presumably.

10 Q. Could it have been something
11 like criminal conduct, right?

12 A. I don't know.

13 Q. So, you have no idea? Okay.
14 Is that troublesome to you at all sir, that
15 you started from a premise that people should
16 be allowed to participate in the KECP if they
17 were still employed after the audit committee
18 pleaded its review. Yet, you don't know what
19 standard of culpability the audit committee
20 used?

21 A. No.

22 Q. Why not?

23 A. Because I believe prophylactic
24 measures we had in place took care of it.

25 Q. Did you have any prophylactic

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 measures in place at the time that you
3 submitted the proposed KECP to this Court?

4 A. No.

5 Q. In fact, it was not until
6 after January 5th, 2006 that KECP program
7 first had prophylactic measures. Is that
8 correct?

9 A. I don't know about the date.

10 Q. Does that sound right to you?

11 A. January 6th --

12 Q. January 5th?

13 A. Could be.

14 Q. It was very recent, is that
15 right?

16 A. Uh-huh.

17 Q. So when you first proposed the
18 eligibility requirements to the KECP, you
19 didn't know whether those claw-back or
20 prophylactic measures would be in place, did
21 you?

22 A. No.

23 Q. And to this day, you don't
24 know whether the prophylactic measures that
25 are being used are the same as what the audit

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 committee used, or different, do you?

3 A. No, I don't.

4 Q. Okay. Is there any reason, in
5 your mind, why the compensation committee
6 could not take this claw-back standard and use
7 it as a standard for escrowing money? Let me
8 ask this a little different way. You have a
9 different standard in place for the escrow
10 provisions, is that correct?

11 A. Yes.

12 Q. I'm sorry?

13 A. Yes.

14 Q. Those are, and I'll just
15 summarize it, on the first page, lower
16 paragraph. If a participant is given the
17 right to make a well submission by the FCC, if
18 a participant is sued or informed, or the
19 company is informed that they will be sued by
20 the FCC, that person is notified, or the
21 company is notified that the participant is a
22 target of criminal investigation. If a person
23 is indicted or agrees to the filing of a
24 criminal information against him, or if the
25 person declines to answer questions on grounds

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 of his Fifth Amendment right against self-
3 incrimination. Any of those things could
4 trigger an escrow, correct?

5 A. Yes.

6 Q. Those are higher standards,
7 from a culpability view, than the claw-back
8 provisions which simply are fail to act in
9 good faith, acted against the best interest of
10 the company, are they not?

11 A. Higher in what way? Define
12 higher for me.

13 Q. Well, for instance, the claw-
14 back provision deals with failing to act in
15 good faith and against the best interest of
16 the company, correct?

17 A. Yes.

18 Q. But that doesn't rise to the
19 level, perhaps, of being indicted or found to
20 be guilty by a jury?

21 A. Yes.

22 Q. Now, let me ask you this.
23 What reason does the compensation committee
24 have for using these five standards that we
25 just listed for escrow as opposed to using the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 threshold standard we talked about on the
3 claw-back provisions?

4 A. It seems to me that escrowing
5 the (indiscernible) not paid out. The claw-
6 back, you give it back. I don't know that the
7 standard is different.

8 Q. That's your reason?

9 A. I think so.

10 Q. Okay. Is there any
11 preventative reason, or just reason why you
12 could not take that claw-back provision and
13 make that the standard for escrowing money?

14 A. Not to my knowledge.

15 Q. If you escrowed money using
16 the claw-back provision, would the employee on
17 the escrow side still be entitled to the
18 proceedings that have the lawyers and due
19 process things that you talked about?

20 A. They would be.

21 Q. They would be?

22 A. Yes.

23 Q. Unless it was required
24 otherwise by the Court.

25 A. Yes.

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2 Q. I'd like to ask just a few
3 questions, sir, about the investigation or
4 whether there -- let me take that back. I'd
5 like to ask you, not the results of the
6 investigations that were done, or what
7 actually occurred in those investigations. I
8 want to ask you about what the compensation
9 committee may have considered in determining a
10 KECP or AIP to present to the Court, okay?
11 You are aware, are you not, that there is an
12 ongoing FCC investigation regarding certain
13 conduct on behalf of either present or former
14 employees at your company. Is that correct?

15 A. Yes.

16 Q. Did the compensation
17 committee, in fashioning this program, do
18 anything to determine whether eligible
19 participants were targets in that FCC
20 investigation?

21 A. I don't know how they would
22 have known to target somebody.

23 Q. I have one issue I'd like to
24 take up. This deals with a confidential
25 matter, and I don't know if -- may, we just

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 approach the bench real quick. I don't want
3 to --

4 THE COURT: Okay.

5 BY MR. BECKWORTH:

6 Q. -- I don't want to transgress
7 on the confidentiality privilege. Try this
8 again. Is it true that the compensation
9 committee did not have before it, in
10 fashioning the KECP, the results of any
11 investigation in relation to the ongoing FCC
12 investigation?

13 A. Yes.

14 Q. Is it true that the audit
15 committee of Delphi concluded a special
16 investigation regarding some of the accounting
17 and control improprieties that are going on
18 regarding Delphi, or had gone on regarding
19 Delphi?

20 A. Yes.

21 Q. Those have led, in part, to
22 the restatement of Delphi, is that correct?

23 A. Did the compensation committee
24 rely, in any way, upon the findings of the
25 audit committee, other than what we talked

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 about earlier, with the fact that certain
3 employees were allowed to remain at the
4 company? No.

5 Q. So you did not -- you or no
6 one else, to your knowledge, at the
7 compensation committee actually looked at the
8 findings by law, or anything of that nature?

9 A. No.

10 Q. Are you aware of whether there
11 is a Department of Justice investigation going
12 on here?

13 A. Huh-uh.

14 Q. Have you, or anybody, to your
15 knowledge, on the compensation committee,
16 looked at any of the documents or other
17 evidence that's been gathered from that
18 proceeding?

19 A. No. I do not know.

20 Q. Okay. They were not
21 considered in any way when fashioning the
22 prophylactic measures or the KECP, correct?

23 A. Uh-huh.

24 Q. So, I'm correct. Okay. Isn't
25 it also true that Delphi had an investigative

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 committee or process that involved an outside
3 auditor, PWC and also the law firm Wilmer,
4 Cutler (indiscernible). Did you, or any
5 person on the audit committee look at the
6 results of those findings, or have you, in
7 fashioning the KECP?

8 A. Compensation committee.

9 Q. Yes, sir. Did you work at any
10 of the exit memos that were prepared for
11 employees who left Delphi? Executive
12 employees who quit or were terminated?

13 A. I don't know.

14 Q. To your knowledge, has anyone
15 on the compensation committee done that?

16 A. Not to my knowledge.

17 Q. At the time of your
18 deposition, you had not read the consolidated
19 class action complaint that was filed by the
20 securities lead plaintiffs, is that correct?

21 A. It's too big.

22 Q. Yes, sir. You have read our
23 objection.

24 A. Uh-huh.

25 Q. After looking at our

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 objection, did you endeavor to investigate any
3 of the allegations in --

4 A. No.

5 Q. To your knowledge, has anyone
6 on the compensation committee done that?

7 A. Not that I know.

8 Q. That's witness, Your Honor.

9 THE COURT: Okay.

10 MR. BUTLER: Your Honor, the
11 next party would be the PBGC on a cross.

12 MR. WILSON: Good afternoon,
13 Your Honor, Eric Wilson for the PBGC.
14 Your Honor the issues of concern to the
15 PBGC are largely identical raised by the
16 committee, so we'll be deferring to the
17 committee on this proceeding.

18 THE COURT: Okay. Very well.

19 MR. WILSON: Thank you.

20 MR. BUTLER: Your Honor, the
21 last cross examiner would be the
22 committee.

23 THE COMMITTEE: No questions
24 here, Your Honor.

25 MR. BUTLER: Your Honor, the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 debtors have no re-direct.

3 THE COURT: All right. Let me
4 just see if I have any questions. Mr.
5 Webber, in addition to being the
6 secretary of the compensation committee,
7 you're the EBP of Human Resources?

8 THE WITNESS: Yes.

9 THE COURT: So, you generally
10 are in charge of personnel matters
11 throughout the entire corporate
12 structure. As I read your affidavit and
13 Mr. Bogdnavich's as well, I take it that
14 the reason that the debtors are seeking
15 approval of the annual incentive plan is
16 that they believe that without it
17 they're not competitive with other
18 comparably situated companies. Is that
19 correct?

20 THE WITNESS: That's one of the
21 reasons.

22 THE COURT: And what are the
23 others?

24 THE WITNESS: The organization,
25 the executive organization, first of

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 all, needs to have a competitive
3 compensation program, so you are correct
4 on that aspect, Judge. Without this
5 piece of compensation, they know that
6 their competitive opportunity will lag
7 behind other competitors. We can figure
8 them out. Without it, we believe, we
9 would have possibly demoralized
10 organization and we would have the
11 accelerated perks that we're seeing
12 continuing, possibly even getting more
13 accelerated to go. So it's a number of
14 reasons why we don't have this
15 (indiscernible) potential for
16 (indiscernible)

17 THE COURT: Well, have people
18 told you that the reason they've quit is
19 that they are not getting a bonus?

20 THE WITNESS: At their exit
21 interview, I have not seen those kind of
22 perks summarized like that. The basic
23 thread going through them is that they
24 seek other opportunities outside Delphi
25 that will, simply, encourage them to go

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 to competitive compensation.

3 THE COURT: Are those
4 opportunities in the automotive industry
5 or are they generally in just big
6 business?

7 THE WITNESS: People have left
8 Delphi to go to companies inside and
9 outside the automotive industry.

10 THE COURT: Mr. Bogdnavich's
11 affidavit says that, at least for the
12 period from 2001 through 2004, there was
13 only one year in which there was any
14 bonus paid. Is that correct? Was that
15 a full bonus then?

16 THE WITNESS: A partial bonus.

17 THE COURT: If -- does the
18 debtor believe that these bonuses
19 actually will end up being paid?

20 THE WITNESS: It's hard to
21 know; we are talking about it now. We
22 always believed that the above average
23 stocks, solid business plan, there was a
24 potential to receive the bonus, and
25 that's what's fair. You have to believe

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2 you have the chance to achieve these
3 opportunities. It's not a guarantee,
4 just a chance.

5 THE COURT: He said, that in
6 Mr. Bogdnavich's affidavit, I believe,
7 he said, that if you look at just the
8 base salary component of executive
9 compensation, as I read it, it was
10 actually in the, either in the top 25
11 percent or the top 40 percent depending
12 on what level you were at. If, and he
13 said that, I guess this is correct.
14 I'll ask him about this, but in
15 comparison to competitors who apparently
16 are able to pay their bonuses, if you
17 factor in that amount, also, of the
18 compensation, that the executives earn
19 the bottom 25 percent.

20 THE WITNESS: That's correct.

21 THE COURT: Okay. If these
22 bonuses are paid in the target amount,
23 the roughly 20 million as opposed to the
24 38, what percentage would it place the
25 employees vis-a-vis their competitors?

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 THE WITNESS: Is it a cash
3 business we are talking about?

4 THE COURT: Well the ARP plus
5 their base salary?

6 THE WITNESS: You can answer
7 better than we can. My guess would be
8 its something upper (indiscernible).

9 THE COURT: Okay. So, around
10 75 percent.

11 THE WITNESS: I guess,
12 depending upon the (indiscernible)

13 THE COURT: Okay. The people
14 who are leaving, obviously must be aware
15 of the debtors' announcement that they
16 are going to, in addition to negotiating
17 with GM and the unions and the
18 creditors, that they're going to
19 rationalize their business, including
20 getting out of various plants and the
21 like. Is that right? I mean, that's
22 been publicly reported, I'd assume it's
23 generally knowledge among the
24 executives.

25 THE WITNESS: Yes, they've

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 heard that discussion, yes.

3 THE COURT: Are the people who
4 have left in the last year, have they
5 been replaced?

6 THE WITNESS: Some of them have
7 been replaced, some of them are in the
8 process of being replaced.

9 THE COURT: So there is --
10 another way to ask this is -- the
11 debtors believe that there is a need to
12 replace them?

13 THE WITNESS: Yeah.

14 THE COURT: It's not just that
15 they're leaving and its not -- given
16 that the debtors are going to be
17 downsizing aspects of this business
18 anyway, you don't need to replace them.

19 THE WITNESS: They've been
20 through some efficiency planning. But
21 by and large, these people are going to
22 be replaced. Those things have not
23 disappointed.

24 THE COURT: When you look at
25 the cost of the bonuses being sought

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 here, how does that stack up with the
3 cost of replacing someone?

4 THE WITNESS: It would vary
5 individual by individual. A senior
6 executive probably costs more to replace
7 initially because you have a finder's
8 fee when you search for an executive.
9 They typically ask for a sign-on bonus
10 or a year and keep bonus and typically,
11 comes to a base pay increase, which
12 could be equal. So, I would say on
13 balance it would cost more to replace
14 than to pay the bonus.

15 THE COURT: Okay. Thank you.

16 MR. BUTLER: Thank you Mr.
17 Webber. Your Honor, the debtors now
18 call Mr. Nick Bogdnavich from the Watson
19 Wyatt firm to -- for cross examination
20 in connection with his declaration,
21 which has been admitted into evidence as
22 Exhibit number 17. Mr. Bogdnavich?

23 (Witness is duly sworn)

24 THE COURT: Okay.

25 MR. BUTLER: Your Honor, by

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 virtue of the designations of testimony,
3 with respect to Mr. Bogdnavich at
4 Exhibit number 32 which has been
5 admitted into evidence, the first two
6 objectors, the IUE and the UAW passed
7 direct cross examination. The next
8 opportunity would go to the United Steel
9 Workers.

10 MR.BECKWORTH: Steel Workers
11 pass at this time.

12 THE COURT: Okay.

13 MR. BUTLER: The next
14 opportunity would go to Wilmington Trust
15 Company.

16 MR. FOX: I don't have any
17 questions at this time.

18 MR. BUTLER: The next
19 opportunity for cross examination would
20 go to the lead plaintiffs.

21 MR. ANGELOVICH: We pass Your
22 Honor.

23 MR. BUTLER: And the PBGC is
24 passed as well as US Trustee. That
25 would leave the creditors committee.

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2 MR. ROSENBERG: Pass, Your
3 Honor.

4 THE COURT: All right. Mr.
5 Bogdnavich, I guess you heard my earlier
6 questions of Mr. Webber. Was he right
7 that if the target is met here, the
8 roughly 20 million, the mid-target, that
9 the combination of benefits, salary and
10 AIP would put the executives roughly in
11 the top 25 percent?

12 THE WITNESS: That's correct.
13 Looking at the cash compensation only,
14 it would be the sum of salary and target
15 annual incentives. Assuming there are
16 adjustments the pay would be
17 approximately 75 percent.

18 THE COURT: Your introductory
19 clause, I just want to make sure I
20 understand that. Do you mean to say
21 that when you're comparing these
22 people's compensation arrangements with
23 the competition, that the competition
24 also has an extra component of some
25 other long-term plan that these don't?

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2 THE WITNESS: Yes. If you look
3 at the exhibit that is on the easel, you
4 can see that at Corporate America there
5 are generally three components to the
6 pay structures; salary, the annual
7 incentive opportunity and the long term
8 incentive. Now, at Delphi preferably
9 when you have add all three to the
10 structure, and assuming that you can pay
11 target pay for the annual incentives,
12 target rewards are a lot of money. To
13 then pay a little bit above the median
14 compared to its peers. Stated another
15 way, another way to analyze it would be
16 that the cash pay that Delphi has a
17 larger portion of the holdover mix with
18 structures than it does in other
19 companies.

20 THE COURT: So if you factor in
21 competitors non-cash pay component,
22 which I guess is stock option plans,
23 where does that place Delphi's workers?

24 THE WITNESS: Either at or
25 slightly above the median.

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 THE COURT: Okay. When you
3 looked at this, did you look at the time
4 when these workers, these executives
5 came on to Delphi? Generally, when did
6 they start working for Delphi?

7 THE WITNESS: I don't know. I
8 would assume that it's different for
9 different executives. Some have been
10 there for years, and others are
11 relatively new.

12 THE COURT: But you didn't
13 break that out?

14 THE WITNESS: I didn't.

15 THE COURT: Okay. So, if
16 someone got a signing bonus, that
17 doesn't figure into this.

18 THE WITNESS: That's correct,
19 except to the extent that the signing
20 bonus would count against the bonus
21 earned under the annual salary.
22 Sometimes provisions are drafted up, I
23 do not know --

24 THE COURT: But this doesn't
25 have that?

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2 THE WITNESS: That would only
3 be in an individual case.

4 THE COURT: All right. Right,
5 if you got a signing bonus -- I see. I
6 take it that Wyatt -- let me ask you did
7 Wyatt have anything to do with the
8 actual target being set, or was that
9 something that the board, I imagine, had
10 set?

11 THE WITNESS: That was derived
12 from management's business department.

13 THE COURT: Okay. Is the
14 formula that's applied to the targets, a
15 formula that's consistently used in
16 these types of annual incentive plans?
17 That is, if you're below the target by a
18 certain percentage you get -- you don't
19 -- you're not just wiped out of your
20 bonus, you get a percentage of the
21 bonus. Is that typical?

22 THE WITNESS: Yes.

23 THE COURT: And are these
24 percentages typical?

25 THE WITNESS: Yes.

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2 THE COURT: Okay. All right.

3 In your view, as an outsider, how
4 significant is it to retaining the
5 executives at this company that this
6 annual incentive plan be put in place?

7 THE WITNESS: I think it's fair
8 and appropriate to be in the debtor's
9 best interest to provide opportunities
10 for incentive compensation for
11 (indiscernible). Again, the key word is
12 opportunities. The performance has to
13 be a certain performance for a mutual
14 (indiscernible) to work out.
15 Essentially all it is, is providing them
16 with an opportunity of competitive
17 payable and is consistent of those of
18 their peers.

19 THE COURT: Okay. Thank you.

20 MR. BUTLER: Can I ask a
21 question, Your Honor?

22 THE COURT: Sure.

23 MR. KENNEDY: Tom Kennedy, Your
24 Honor, for the IUE.

25 BY MR. KENNEDY:

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 Q. Isn't it correct, sir, that
3 you do not have expertise in labor relations?

4 A. Yes.

5 Q. And the plan that you drafted
6 for Delphi, would you have drafted or proposed
7 essentially the same plan whether it had a
8 unionized work force or not?

9 A. The answer is probably yes.

10 Q. So, is it fair to say that
11 your analysis of the plan as being in the
12 interest of the debtors is not based on a
13 comparison of the dangers that the plan might
14 pause, or rather cause, to the eventual
15 successful resolution of collective bargaining
16 negotiations?

17 A. I have no knowledge about the
18 effect my plan may have on individuals.

19 MR. KENNEDY: Enough. Thank
20 you.

21 THE COURT: Do you have any
22 redirect?

23 MR. BUTLER: Your Honor, for
24 the record Mr. Bogdnavich referred in
25 his responses to the Court, I referred

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 to a document that was on an easel.
3 That is, for the record, Exhibit number 1 of
4 the trial exhibits for the trial today. Your
5 Honor, the debtors would now call our final
6 witness, and place Mr. John D. Opie, who is
7 our outside lead director of the independent
8 board of directors to be available for cross
9 examination in connection with his declaration
10 which has been filed and admitted into
11 evidence as Exhibit number 18.

12 (Witness is duly sworn)

13 MR. BUTLER: Again, it is my
14 understanding by virtue of having, and
15 now its stating the fact the IUE asked
16 some questions, I'll ask it again. The
17 last witness, by virtue of having
18 designated Exhibit 33, which is in
19 evidence, with respect to Mr. Opie's
20 deposition, my understanding, is that
21 both the IUE and the UAW pass cross
22 examination, is that correct?

23 THE COURT: Correct, pending
24 any questions that might be asked. That
25 takes us to United Steel Workers.

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2 MR. BECKWORTH: Pass at this
3 time.

4 MR. BUTLER: The next
5 opportunity goes to Wilmington Trust
6 Company.

7 MS. LEONHARD: I don't have any
8 questions.

9 MR. BUTLER: The next
10 opportunity goes to the lead plaintiffs.

11 MR. ANGELOVICH: A brief cross
12 examination, Your Honor.

13 THE COURT: Okay.

14 MR. ANGELOVICH: May it please
15 the court, Your Honor, my name is Jeff
16 Angelovich, I'm with the law firm of
17 Nix, Patterson and Roach in
18 Daingerfield, Texas; here on behalf of
19 the lead plaintiffs in the
20 securities litigation. If it pleases
21 the Court, I'd like to proceed with the
22 cross examination.

23 THE COURT: That's fine.

24 BY MR. ANGELOVICH:

25 Q. Mr. Opie, how are you this

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 afternoon?

3 A. Fine.

4 Q. You are the lead independent
5 director of the debtors, is that correct?

6 A. Yes.

7 THE COURT: You have to speak
8 up just a little because the microphone
9 is over the desk.

10 BY MR. ANGELOVICH:

11 Q. Would you please tell the
12 Court how long you have held that position
13 with the debtor?

14 A. Since 2002.

15 Q. To the present day?

16 A. Yes.

17 Q. And during that same period of
18 time that you've been on the compensation
19 committee at Delphi?

20 A. (Indiscernible).

21 Q. And, of course, then that
22 would apply equally, as well, to the audit
23 committee?

24 A. Yes.

25 Q. And is it true that the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 ultimate determination of who is or is not
3 going to be a KECP participant is going to be
4 made by the compensation committee?

5 A. Yes.

6 Q. And, of course, they take
7 recommendations, I assume, from human
8 resources or personnel, prior to making that
9 decision?

10 A. (Indiscernible).

11 Q. And as such, it would make
12 sense that the compensation committee was
13 actually involved in drafting\ what we call
14 either the prophylactic or the safe harbor
15 provisions of the KECP. Is that correct?

16 A. Yes.

17 Q. You were also in that role,
18 involved in developing the events that would
19 trigger the placement of KECP payments into
20 escrow?

21 A. The discussion of how we came
22 out with that report

23 Q. And I understand from your
24 deposition that you didn't draft the words
25 that were put in the document, but you were

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 involved in the process in deciding what
3 needed to be done. Correct?

4 A. Yes.

5 Q. Okay. Mr. Webber was a little
6 bit unsure of the date. Does it seem to be
7 consistent with your recollection that the
8 process of developing these safe harbor
9 provisions began in January of this year,
10 after Judge Drain indicated some hesitance in
11 approving the program without those measures?

12 A. It was my understanding of how
13 it was developed, was in common discussions,
14 including creditors that ourselves, in terms
15 of being comfortable that the right people
16 were paid and the wrong people were not paid.
17 So that it was developed over a period of
18 time.

19 Q. Okay. Was this being
20 discussed in October of '05, when the original
21 KECP plan was filed with this Court, shortly
22 after the debtor filing bankruptcy?

23 A. To the best of my
24 recollection, in that form, no.

25 Q. So that preceded somewhere

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 down between that date and where we are today?

3 A. Yes.

4 Q. Okay. Is it a fair summary
5 that the goal of the safe harbor provision, is
6 to make sure that no executive is paid under
7 the KECP that does not deserve to be paid?

8 A. Yes.

9 Q. Okay. And, within that
10 category of executive that doesn't deserve
11 payment, would you agree that that would
12 include individuals who are -- that may have
13 participated in conduct that's the subject of
14 the SEC investigation?

15 A. They were found to be involved
16 in inappropriate accounting, yes.

17 Q. Yes, sir. And, similarly, it
18 may not, necessarily, but it may involve
19 individuals who are the subject of the conduct
20 of the Department of Justice investigation,
21 correct?

22 A. Yes.

23 Q. Okay. And, I suppose it would
24 also include individuals who may have
25 participated in the events that led to Delphi

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 restating the financial records?

3 A. Yes, there's some relationship
4 between the two, but yes.

5 Q. Okay. And, just to make sure
6 I'm clear from Mr. Webber's testimony, from
7 your declaration, your deposition, in the
8 past, and as best I can tell going forward in
9 the future, the compensation committee is
10 relying on the audit committee to do an
11 investigation or committees of the audit
12 committee to do an investigation, and
13 determine whether potential beneficiaries were
14 involved in something improper. Is that
15 correct?

16 A. Generally, yes.

17 Q. Okay. And, as far as you
18 understand it, and of course, you're on the
19 audit committee, I'm not going to ask you any
20 details, but they are continuing to cooperate
21 with any ongoing governmental investigations,
22 is that correct?

23 A. Yes, it is.

24 Q. So, I want to break it up just
25 real briefly into the past and what we see

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 going on in the future. For those, and we'll
3 call them employment actions that the audit
4 committee has taken, I think I've seen that
5 term in maybe your declaration, actions that
6 they've taken in the past, if an employment
7 decision regarding an executive who was deemed
8 inappropriate by the audit committee, it was
9 the position of the compensation committee
10 that that person would already be off the
11 payroll. Is that correct?

12 A. Yes.

13 Q. And, as such, it's a natural
14 conclusion, that if they're not on the
15 payroll, they're not going to get paid under
16 the KECP?

17 A. Yes.

18 Q. Okay. Is it also correct that
19 going forward in the future, the compensation
20 committee continues to rely on the audit
21 committee, to continue their investigations?

22 A. We rely on them continuing to
23 give us feedback in terms of any additional
24 and extras that are taken.

25 Q. Okay. The compensation

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 committee is not independently undertaking any
3 investigations to determine whether certain
4 beneficiaries should be eligible. Okay. And
5 I recall from your deposition, and I just want
6 to make sure that this statement is something
7 you want to stand with, is if the audit
8 committee takes action regarding a KECP
9 participant in the future, that your committee
10 or your other committee, the compensation
11 committee is immediately going to take him off
12 the KECP program?

13 A. It depends on the nature of
14 that feedback, of course, in terms of what
15 action and what the implications are. But if
16 the recommendation is that they're leaving the
17 payroll, then they would no longer be
18 eligible.

19 Q. Okay. Okay. I want to talk
20 to you about the safe harbor provisions a
21 little bit. Would it help you to have a copy
22 of that in front of you?

23 A. It would.

24 Q. Okay, let me get you one real
25 quick. This also reads Exhibit 5 in the big

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 book there. I have one. Your Honor, may I
3 approach --

4 THE COURT: Yes.

5 MR. ANGELOVICH: -- just give
6 him one of these.

7 BY MR. ANGELOVICH:

8 Q. I want to talk first, if we
9 can, and just briefly, about what I call
10 escrow triggering events. And in that sheet
11 you have in front of you which is Exhibit 5,
12 it seems to me, and I tried to nudge Mr.
13 Beckworth because I think he missed a couple
14 when he was doing his cross examination, but
15 in the first paragraph there are a couple
16 things that can trigger escrow. The debtor
17 asserts a claim, that's one. The official
18 committee of unsecured creditors could inform
19 the debtor that they're going to come to the
20 judge here and say, can we file a claim, and
21 then proceed to do so. So those are the first
22 two. Then we have this notice, in the second
23 paragraph, the notice of the right to make a,
24 well, submission by the SEC. Maybe the
25 participant or the committee's told that the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 person's going to be sued, or has been sued by
3 the SEC, notified that they're the target of a
4 criminal proceeding, indicted or agrees to
5 filing over criminal information, or declines
6 to answer questions based on his fifth
7 amendment right. Are those all triggering
8 events?

9 A. Yes.

10 Q. Mr. Opie, there is nothing in
11 that list that ties any audit committee action
12 regarding the KECP participant to the
13 escrowing of any payment. Is that correct?

14 A. I don't quite understand the
15 question.

16 Q. Well, based on the exclusive
17 list, and you would agree that this is an
18 exclusive list --

19 A. I would agree that the list
20 that's been established and agreed upon
21 between the two parties, the creditor and the
22 debtor.

23 Q. And as such, on that list of
24 seven triggering items, none of them are
25 actions taken by the audit committee, is that

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 correct?

3 A. They made the observations
4 made by the audit committee (indiscernible).

5 Q. Observations by the audit
6 committee is not on the list either, is that
7 correct?

8 A. (Indiscernible) they would
9 observe it, and then take action, and
10 recommend to the (indiscernible) committee
11 that they, that action be taken on the
12 individual, and, therefore, would be exempted
13 from the KEPC account.

14 Q. Well, sir, and I understand
15 that that may be your interpretation of this
16 document, that document doesn't say that. Is
17 there anything in those provisions either
18 requiring or authorizing the compensation
19 committee to escrow funds? I'm going to ask
20 this one more time in response to audit
21 committee activity.

22 A. Since their statement
23 (indiscernible).

24 Q. Is there anything in these
25 first two paragraphs that either requires or

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 authorizes the compensation committee to
3 escrow funds in response to audit committee
4 actions?

5 A. No, it doesn't say it here,
6 but it wouldn't be too --

7 Q. Does it say it there?

8 A. I haven't looked where it
9 specifically says that, but we've said it many
10 times, that we have no interest or intent to
11 pay anyone that doesn't deserve to be paid by
12 us.

13 Q. Okay. So maybe these
14 provisions would be better if that was
15 explicitly spelled out. Is that a fair
16 statement?

17 A. It's a fair statement.

18 Q. Okay. Now let's turn the page
19 real quick and look at their forfeiture, claw-
20 back standards. And, I know you were in the
21 court room when Mr. Webber was giving his
22 testimony, and so I'm not going to go through
23 the standard again, but as it was read, it's a
24 good faith standard. Is that a fair
25 statement?

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 A. Yes.

3 Q. All right. Do you agree with
4 Mr. Webber that it is the appropriate standard
5 to determine the eligibility for KECP
6 participation?

7 A. Do you mean, should they be on
8 the payroll or not?

9 Q. No, sir. Whether they acted
10 in good faith or failed to act in good faith
11 and in a manner the company reasonably
12 believes to have been or not opposed to the
13 best interest of the company.

14 A. Yes. Our first test is there
15 on the payroll. (Indiscernible) they are
16 acting on bad behavior.

17 Q. Okay. Now, Mr. Webber
18 testified that he believed that you knew both
19 the standard that the audit committee used in
20 their investigation and the standard that's
21 set forth in this document. Is that a correct
22 statement?

23 A. Yeah. I think that's correct.

24 Q. Can you tell me what that
25 standard is --

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 MR. BUTLER: Objection.

3 BY MR. ANGELOVICH:

4 Q. You are a committee employee.

5 MR. BUTLER: Objection Your

6 Honor, we are now going into what the

7 audit committee did in its

8 investigation. Your Honor ruled in pre-

9 trial motion, that wasn't part of this

10 deal.

11 MR. ANGELOVICH: Your Honor,

12 briefly, that's correct, Your Honor did

13 rule that. What the debtor is asking

14 this Court to do is to say, well, the

15 compensation committee is going to rely

16 on whatever the audit committee does.

17 Take our word for it, the standard that

18 the audit committee used, is using, is

19 appropriate, and I don't know -- I think

20 based on their reliance, at least on the

21 results of that, at a minimum, we're

22 entitled to know that.

23 MR. BUTLER: Your Honor, that's

24 now what the KECP AFP motion says. What

25 you said to ask the Court to be

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 comfortable with the prophylactic, safe
3 harbor provisions be put in. That's
4 been -- that's the way this has been
5 constructed. And not to go into what
6 the audit committee thought or didn't
7 think or what standards they used, or
8 what the investigation was or any of
9 those other matters that the lead
10 plaintiffs were so interested in delving
11 into.

12 MR. ANGELOVICH: You know, Your
13 Honor, I appreciate the significance of
14 the fact that we have the securities
15 case on the bottom. We are here because
16 we believe this KECP program is
17 inappropriately lenient, and believe
18 that the prophylactic measures are
19 inappropriate. That's the reason we're
20 here. The Court has made it very clear
21 that we're not getting, going to get any
22 discovery on this, but I think it's also
23 very clear that if they are going to sit
24 back and by that, I mean Delphi's
25 compensation committee, and wait and see

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 what the audit committee does. We at
3 least should know what standard that is.

4 THE COURT: But the audit, when
5 you say what the audit committee does, I
6 mean, that was a question I had with the
7 original question, which is someone
8 named by the audit committee? I think
9 they're very different. They may well
10 be very different points. I mean, you
11 can name people in different ways doing
12 different things.

13 MR. ANGELOVICH: And, Your
14 Honor, that's correct and perhaps I was
15 imprecise. I'll tell Your Honor that
16 I'll be upfront until the court order
17 can surface. If the audit committee is
18 using a criminal standard, that's
19 something that gets close to
20 willfulness. They may not take an
21 employment action against somebody who
22 has failed to act in the good faith of
23 the company and in a manner that the
24 company reasonably believes to have been
25 in or not opposed to the best interest.

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 And so, our point is, without knowing
3 that standard, there may be people who
4 are filtering through the audit
5 committee who don't meet this standard.
6 Yet, at the same time, they are relying
7 on the audit committee to weed those
8 very people out, in those terms.

9 MR. BUTLER: No, I think you
10 are assuming, you say they are relying
11 on the audit committee to weed those
12 people out, I think that's not an
13 assumption you should make.
14 It's information that is relevant to
15 them, but it's not the only basis.

16 MR. ANGELOVICH: Okay, Your
17 Honor.

18 THE COURT: I think you can,
19 you know -- consistent with my earlier
20 rulings, I think you can certainly ask
21 me to read into my evaluation of this
22 motion, the fact that they're not
23 revealing this information. But, now
24 I'm seeing the two off against each
25 other, I don't think it's, I mean,

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 because they are not directly tied
3 together, I don't think its, it -- it is
4 so important to learn what their
5 standard is, overriding the other issues
6 that, that we've had other hearings
7 about, as to why were not having
8 discovery on that point.

9 MR. ANGELOVICH: Your Honor --

10 THE COURT: I'll sustain the
11 objection.

12 MR. ANGELOVICH: And I'll
13 reserve that argument and move on to my
14 last few questions.

15 THE COURT: Okay.

16 BY MR. ANGELOVICH:

17 Q. Mr. Beckworth asked Mr. Webber
18 this question, and I'm going to ask you this
19 question. What consideration, if any, did the
20 compensation committee give to the idea of
21 applying this good faith standard to the
22 triggering of escrow funds? Put it up on the
23 front end and make that decision?

24 A. Well, when we put the flyer
25 together, we were ready to go. We eased the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 storm that those on the payroll would be
3 considered as partners. We had no reason to
4 believe or pick or choose any employee, having
5 (indiscernible) and the escrow held back.
6 But, at some point during the process, and/or
7 during the program, in ended up needing to be
8 entertained when we, being the escrow account,
9 began to surface?

10 Q. Okay. Was there an
11 impediment, or is there an impediment to the
12 compensation committee obtaining access to
13 exit interviews?

14 A. I would say there's no
15 impediment, but it's not a practice. It's not
16 something we do. We don't get into that
17 depth. What we can count on the feedback from
18 HR and the administration, in terms of the
19 kinds of reasons that the people are leaving.

20 Q. Is there an impediment to the
21 compensation committee obtaining the results
22 of the audit committee investigation?

23 A. You know, you keep -- we can't
24 put a wall between the two, it is confidential
25 and we are convening with the SEC and the POJ

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 on the audit side and we don't have that open
3 and cover for the rest of the topic.

4 Q. Would there be something -- is
5 that, that's just an internal decision.
6 There's not actually something that precludes
7 you from doing it.

8 A. If you recall, I would say
9 that would be a decision with all the parties
10 involved.

11 Q. Okay. Is there any impediment
12 to the compensation committee obtaining
13 whistleblower reports? Or would it be the
14 same as the answer you just gave?

15 A. No. A whistleblower report
16 might come in from another avenue, another
17 channel, through an ombudsmen, kind of input
18 through HR so, no, that would go -- a
19 whistleblower report didn't go with the audit.

20 Q. Okay. And in fact, sometimes
21 those can go to you. There's a provision that
22 allows for that, correct?

23 A. There used to be one, but it
24 generally goes through the audit committee.

25 Q. And then, finally sir, what

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 consideration, if any, did the compensation
3 committee give to the cost, consider the cost
4 to the debtor to recoup KECP payments that
5 were already made, rather than escrow, if it
6 came to that?

7 A. The cost of getting the
8 payment back?

9 Q. Yes.

10 A. I don't -- we just assumed
11 that if there was a situation where there may
12 need to be asked for a lien or called back,
13 that we would do that.

14 Q. Okay, and I want to talk about
15 a situation where it's not in escrow, where
16 it's just been paid and then you decide later
17 on, well, we need to call that back. Did the
18 compensation committee sit down and decide,
19 well, what it is going to cost the debtor to
20 go out and recoup that money, rather than just
21 holding it on the front end, until a final
22 decision was made?

23 A. Well, we didn't because we
24 assumed that if it was appropriate to call it
25 that. That it was -- if we reached only

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 (indiscernible) then we would make those
3 decisions as we move forward, but we would
4 rather (indiscernible).

5 Q. Thank you sir, I'll pass the
6 witness. Thank you, Your Honor.

7 THE COURT: Okay.

8 MR. BUTLER: Your Honor, the
9 only other party that's reserved cross
10 examination is the committee.

11 MR. BUTLER: No questions, Your
12 Honor.

13 THE COURT: Okay.

14 MR. BUTLER: Your Honor, I have
15 some brief re-direct, or does the Court
16 want to ask --

17 THE COURT: Well, maybe you'd
18 better wait till I ask the questions, in
19 case you might want to ask some more.
20 Am I right that none of the AIP payments
21 will be made until at least six months
22 down the road?

23 THE WITNESS: We would -- we
24 would see them to be paid, if I'm
25 correct, I have to refer to some of the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 experts, in the end of June, beginning
3 of July when we get the results of the
4 first quarter.

5 THE COURT: So, it wouldn't be
6 -- it's basically a six month then.

7 THE WITNESS: Yes.

8 THE COURT: Okay. Mr., I
9 forget whether it was Mr. Webber or Mr.
10 Bogdnavich, you said that the targets
11 were from the company's business plan?

12 THE WITNESS: Yes.

13 THE COURT: Is that the
14 business plan upon which the company is
15 premising the negotiations with the
16 union?

17 THE WITNESS: That's the
18 business plan that was developed by the
19 union for teams, so the answer to that
20 would be yes.

21 THE COURT: Okay.

22 THE WITNESS: But we have named
23 (indiscernible) by going for this
24 (indiscernible) and making certain
25 assumptions, that we hadn't made yet,

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 nor do we have a management team that's
3 going to describe (indiscernible).

4 THE COURT: That was my next
5 question. Is it -- well first of all,
6 are you familiar with the development of
7 the business plan and its basic
8 assumptions?

9 THE WITNESS: Yes, Your Honor.

10 THE COURT: Is, I guess you
11 heard, the answer to the earlier
12 question that at least from 2001 through
13 2004 there was only a partial bonus, and
14 that was only paid once. Is it your
15 view that, unlike that situation, this
16 target is easily met?

17 THE WITNESS: No, over the
18 years (indiscernible) increase the
19 (indiscernible) for all of us together.
20 And, second, (indiscernible).

21 THE COURT: Do these targets
22 assume the -- either the contextual
23 restructuring or the implementation of
24 the proposal to the unions?

25 THE WITNESS: No. The exempted

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 the benefit and/or the credit that you
3 would receive (indiscernible) and
4 (indiscernible).

5 THE COURT: Okay. All right.

6 BY MR. BUTLER:

7 Q. Mr. Opie, just a couple of
8 questions on re-direct. Did you have occasion
9 to personally become involved in the
10 discussions with the creditors committee with
11 respect to the KECP?

12 A. Yes, I did.

13 Q. In fact, you were designated
14 as one of the two negotiators from the
15 company, to talk with the credits crew, wasn't
16 that correct?

17 A. Yes.

18 Q. Do you recall why the
19 creditors committee wanted you to be involved
20 as the lead independent director of the
21 company?

22 A. No, I don't recall the reason,
23 but they requested that Steve Miller, the CEO
24 and myself meet them in New York to have a
25 discussion, hoping that there could be a union

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 of the minds and we could listen to their
3 concerns. And we, in turn, could give them
4 our concerns.

5 Q. Do you participate in the
6 KECP, Mr. Opie?

7 A. No, I don't.

8 Q. Does Mr. Miller participate in
9 the KECP?

10 A. No, he doesn't.

11 Q. Do you recall whether that
12 meeting occurred in the fourth quarter of last
13 year in December or at some other time?

14 A. December 19th, I remember it
15 well. It's the Christmas holidays in New
16 York.

17 Q. And did the subject of safe
18 harbor and prophylactic provisions come up in
19 the discussions you had there with the
20 committee in terms of trying to sort through
21 how this money might be paid?

22 A. Not in that format, or not
23 with that in mind, but it did come up that
24 there was great concern that we pay the
25 appropriate people, and we do not pay those

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 that His Honor and the rest have expressed
3 concerns about. We paid people that
4 (indiscernible).

5 Q. And the discussions that
6 continued throughout the month of December
7 lead to those -- lead eventually to those
8 prophylactic provisions being adopted?

9 A. Yes, I think (indiscernible).
10 Many know that there were several versions
11 that were floating through (indiscernible).

12 Q. Can you look back at Exhibit 5
13 in this big book, or you could look, I think
14 you still have the prophylactic version in
15 front of you, Mr. Opie. So, you can look at
16 that. That's Exhibit 5. Would you just look
17 at the front page, the escrow requirements and
18 in the first paragraph there's a provision
19 that says that there'd be an escrow in the
20 event that the debtors asserted their claim.
21 Do you see that? It's about five, six lines
22 down? From the first paragraph, you could
23 just read the first paragraph up through where
24 it talks about the debtors asserting a claim.

25 A. All right.

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2 Q. Mr. Opie, I just ask you, as
3 an ex-officio member of both the audit and the
4 compensation committee, if the audit committee
5 determined that the company had claims against
6 an existing employee, would it advise the
7 compensation committee?

8 A. Yes. I believe it would.
9 Usually they file the compensation committee
10 in the HR organization.

11 Q. And sitting as a member, ex-
12 officio member of both those committees, do
13 you believe that you received that information
14 from the audit committee sitting as a member
15 of the compensation committee that you would,
16 in fact, invoke the existing terms, the
17 prophylactic provisions, and therefore,
18 trigger the escrow provisions?

19 A. I believe we would at that
20 point. I mentioned earlier (indiscernible).

21 Q. Are you familiar, generally,
22 with the target that had been adopted with
23 respect to the pay-outs for the six month
24 period?

25 A. Yes.

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 Q. And, is it correct that they
3 are referred to as Ibida UG and Obadar UG?

4 A. Yes, they are.

5 Q. Is the Ibida UG phrase some
6 sort of earnings calculation sir?

7 A. Yes.

8 Q. And can you tell the court
9 what the UG is?

10 A. UG is merely a reference to
11 Union and General Motors.

12 Q. And is it true, sir, that for
13 purposes of performance under this program,
14 any benefits of restructuring with General
15 Motors and the unions are excluded from what
16 would be the -- the performance would be based
17 on. And that's true for the Obedah UG at the
18 division level as well?

19 A. (Indiscernible).

20 Q. No further questions, Your
21 Honor.

22 THE COURT: Okay. You could
23 sit down.

24 MR. BUTLER: The next order of
25 witnesses would be the IUE. In dealing

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 with the next witness, the IUE has two
3 declarations of Mr. Henry Reichard, that
4 have been admitted into evidence.
5 Declarations -- rather Exhibits number
6 19 and 20.

7 MR. SPRINGER: That's correct.
8 The IUE would call Mr. Riker to Your
9 Honor, he's in the courtroom.

10 (Witness is duly sworn)

11 BY MR. SPRINGER:

12 Q. Good afternoon Your Honor,
13 David Springer for the debtors. Good
14 afternoon, Mr. Riker. I just have a few
15 questions for you, sir. You don't question
16 the fact that when Delphi was spun off from
17 General Motors it had an executive
18 compensation program that had four components
19 to it. Number one, base salary. number two,
20 benefits, number 3, annual incentive
21 compensation and, number 4 long-term incentive
22 compensation. You don't question that do you?
23 And you don't question the fact, as we sit
24 here today, that executive compensation at
25 Delphi is actually less than that at other

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 domestic auto suppliers, automat -- parts
3 manufacturers, you don't question that do you?

4 A. (Indiscernible).

5 Q. So, you don't have any.

6 A. I don't have any.

7 Q. And you don't question the
8 fact that today, executive compensation at
9 Delphi is less than that at other big public
10 companies. You don't question that either do
11 you?

12 A. I don't know the compensation
13 of other companies. I don't know.

14 Q. So you don't have any basis to
15 question. And you don't question the fact
16 that as we sit here today that the executive
17 compensation at Delphi is limited to that two
18 parts of that four part structure that we
19 talked about. You don't question that -- do
20 you sir? That it's limited to salary and
21 benefits? And you don't question the fact
22 that the limited six month annual incentive
23 program that's before the court today is
24 within the range of competitive practices.
25 You don't question that either do you sir?

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2 And finally, sir, of course you don't support
3 Delphi's request for approval. We know that
4 right? And is it true that you can't, as a
5 union official, support a request for
6 executive incentive compensation in a labor
7 transformation case like this? Isn't that
8 true?

9 A. I can't support, and our
10 membership can't support lucrative bonuses,
11 when we know that the dollars and it faces a
12 concessionary agreement that we are being
13 handed.

14 Q. I have no further questions,
15 Your Honor. Thank you sir.

16 A. Any more questions for Mr.
17 Riker? You can step down.

18 MR. BUTLER: Your Honor, the
19 fifth witness in the order that's been
20 agreed is Mr. Steve A. Grandstaff, who
21 has filed a declaration in opposition of
22 the KECP program on behalf of the UAW.
23 That declaration has been admitted into
24 evidence as exhibit number 21.
25 (Witness is duly sworn)

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2 BY MR. SPRINGER:

3 Q. Good afternoon Mr. Grandstaff.

4 Nice to see you again today, sir. Some of
5 these questions will sound a little bit
6 familiar. You're here as the representative
7 of the United Auto Workers. Is that right
8 sir?

9 A. Yes.

10 Q. And it's true that you don't
11 question the fact, like Mr. Riker that when
12 Delphi was spun off from General Motors, it
13 had a four part executive comp., plan; wages,
14 salary, excuse me salaries, benefits, annual
15 incentive comp and long-term incentive comp.
16 You don't question that, do you?

17 A. I have no way of knowing that.

18 Q. And you don't question the
19 fact that as we sit here today, Delphi's
20 executives are only getting paid under two
21 parts of that four-part program. You don't
22 question that?

23 A. I'm not totally aware of how
24 they put an agreement in the works.

25 Q. Well, you don't have any

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 knowledge or information to the contrary do
3 you?

4 A. No.

5 Q. And you don't question the
6 fact that today Delphi's executive
7 compensation is below that of its competitors
8 in the domestic auto parts manufacturing
9 business. You don't question that do you?

10 A. I don't really know the facts
11 to support it.

12 Q. So you don't, you don't
13 question it right?

14 A. I don't know the facts to
15 support it.

16 Q. Well, did you make any effort
17 to find out, look into the facts, before you
18 came to testify today? Now, you don't
19 question the fact that the six month annual
20 incentive program before the court is within
21 the range of competitive practice do you?

22 A. I don't know the facts to
23 support that.

24 Q. So you don't know? Now, your
25 understanding is that the amount of money

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 that's at stake under the six month AIP before
3 the court today is about 21 million dollars,
4 is that right?

5 A. I don't know.

6 Q. And is it correct that it is
7 not your view, and it's not the view of the
8 United Auto Workers that if the court
9 authorizes Delphi to pay that 21 million
10 dollars to its executives, that that money
11 will be taken away from the workers. Isn't
12 that right.

13 A. Even so far as going out and
14 collecting that from the workers?

15 Q. No, isn't it true, sir, that
16 it is not your view, that any monies that the
17 court authorizes for Delphi exec's by way of
18 an incentive compensation, will be taken away
19 from the workers. Isn't that true?

20 A. I'm not quite sure of your
21 question. Are you asking me (indiscernible)?

22 Q. Well, at your deposition
23 yesterday, were you asked these questions, and
24 did you give these answers, on page 28.

25 Question: Has the UAW told its

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 membership that any monies that the court
3 authorizes be paid to Delphi executives by way
4 of incentive compensation will be taken away
5 from the workers.

6 Answer: I don't think so. I don't
7 recall any communication like that.

8 Question: Do you believe that?

9 Answer: I didn't even put it in those
10 terms.

11 Question: I'm asking you, as you sit
12 here today, is it your view or opinion that
13 any sums that are approved by the court to be
14 paid to the executives by way of incentive
15 compensation, will be taken away from the
16 workers?

17 Answer: No.

18 Were you asked those questions, and did
19 you give those answers yesterday?

20

21 A. Yes, I did.

22 Q. I have no further questions,
23 Your Honor.

24 THE COURT: Mr. Grandstaff, I
25 reviewed your affidavit and Mr.

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 Reichard's affidavit, and what I chiefly
3 take away from them is the obvious
4 point, that it is harder to persuade
5 your constituents to make substantial
6 reductions in benefits and everything
7 else that you are being asked to do
8 while there is an increase in
9 compensation for the executives. Is
10 that correct?

11 THE WITNESS: Yes, it is.

12 THE COURT: Now, obviously,
13 you've heard the testimony today, and
14 you've read the pleadings which suggest
15 that if not today, at some point, it
16 appears that the compensation for the
17 executives should be brought into line
18 with their competitors. And my question
19 is, if not now, when will that be?

20 THE WITNESS: In my opinion,
21 Your Honor, the point in time is when
22 the executives would be able to bring
23 Delphi out of the bankruptcy situation,
24 make it a whole company again, where the
25 employees of the company felt secure in

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 their employment and their future. But,
3 so long as the company remains in this
4 questionable state, and you're asking
5 the workers to give up on wages,
6 benefits and pensions, for the
7 executives to take a profit, at that
8 point in time doesn't seem fair, because
9 at that point in time they won't know
10 whether they're going to take their
11 profit and let the company continue to
12 sink versus work hard to make the
13 company healthy again for everybody's
14 benefit.

15 THE COURT: So, correct me if
16 I'm wrong, what I take away from that
17 is, that the UAW is not opposed to
18 making the executives' compensation
19 competitive, but they want to do it when
20 there's an overall restructuring,
21 including not only the pay of the
22 workers.

23 THE WITNESS: Yes, Your Honor.
24 I think there would need to be equality
25 of sacrifice because at one point in

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2 time we asked the workers to give more,
3 and you're offering the executives more,
4 it's a clash and I feel when there are
5 employees that are worried about
6 mortgages and cars and kids' colleges
7 and stuff like that. If they're going
8 to have to rethink their whole
9 lifestyle, while at the same time the
10 executives have what they have and
11 they're gaining more improvement. It's
12 a --

13 THE COURT: Well, okay. If I
14 were an executive, I could read a lot
15 into the phrase equality of sacrifice,
16 because what I heard you say first
17 suggested that it's a timing issue and
18 everyone should be in the same boat
19 together, but that once that boat rises
20 out of bankruptcy then there's no
21 problem. I'm not sure, in the second
22 answer you gave, whether there was an
23 additional suggestion that, if, the
24 workers are asked to give up significant
25 concessions and agree to do so, or I

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 eventually have to impose them, then,
3 they would just simply not agree to any
4 bonus. I don't think that's what I
5 heard you say. But I, if I were an
6 executive, I could imply that from what
7 you were saying.

8 THE WITNESS: May we speak
9 freely?

10 THE COURT: Sure.

11 THE WITNESS: I don't think
12 it's so much the employees agreeing to a
13 bonus, it's more the employees agreeing
14 to a scaled down labor kind of trap,
15 that would drastically scale down labor
16 contracts --

17 THE COURT: Oh no, I understand
18 that. I understand that. But if you
19 start with the premise that the basis
20 for convincing your people to agree to
21 that significant change for the worse,
22 is to make Delphi competitive so that
23 it not only survives, but is healthy,
24 then, you would think that it would also
25 be important to be competitive at the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 executive level too. Because that --
3 otherwise you're not going to be able to
4 hire executives. So, I'm still trying
5 to figure out whether this is just a
6 timing issue, where I could understand
7 where workers may be concerned about
8 executives jumping the gun, or whether
9 it's just an issue where workers are
10 saying, well, if I'm going to have to
11 give up anything, the executives aren't
12 going to get anything more. The latter
13 point troubles me a little bit. The
14 timing issue I understand.

15 THE WITNESS: I feel it's a
16 timing issue, mixed with a success
17 issue, if the executives continue to
18 drain the company and drive the company
19 closer to a total disbanded, where you
20 shut down all the plants, etc., and then
21 they walk away from it, with bonuses in
22 their pocket, while all the workers not
23 only lose what they have now, plus lose
24 their livelihood when the plants shut
25 down: I don't understand why the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 executives would be assessed to have not
3 grown the company, or brought the
4 company into this unhealthy state.

5 THE COURT: Okay. Thanks. Any
6 further questions?

7 MS. CECCOTTI: For United Auto
8 Workers, judge we have no questions for
9 the witness. Thank you.

10 THE COURT: Okay. You could
11 sit down, sir.

12 MR. BUTLER: Okay, sorry. Your
13 Honor, the final witness of the six
14 witnesses, is Mark Shaw for the Steel
15 Workers. His declaration has been
16 admitted to evidence as exhibit number
17 22.

18 (Witness is duly sworn)

19 BY MR. SPRINGER:

20 Q. Good afternoon Mr. Shaw. Nice
21 to see you again today sir.

22 A. No problem.

23 Q. I'll try not to be too
24 imaginative with you either, and just touch on
25 some of the same few points. Now you are the

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 representative today of the United Steel
3 Workers, is that right?

4 MR. PETERSON: Objection as to
5 the use of the word representative.
6 Obviously he's represented by counsel
7 who is in back of you.
8 (indiscernible).

9 MR. SPRINGER: Well, I'll
10 rephrase it.

11 THE COURT: Sustained.

12 BY MR. SPRINGER:

13 Q. You're the designated witness
14 for the United Steel workers here right?

15 A. Correct.

16 Q. And, you're actually a union
17 official, are you not sir?

18 A. Yes, I am.

19 Q. What is your title with the
20 union?

21 A. I'm kind of the coordinator
22 for the U.S.W., District 1 and I've come to
23 New York State from Ohio.

24 Q. And the -- so far as you know,
25 the USW has made a decision to designate you

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 as the person to come testify on behalf of the
3 union today.

4 A. That's correct.

5 Q. And would it be true that
6 today, United Steel Workers is not in a
7 position to offer any evidence at all with
8 regard to whether or not the compensation paid
9 to Delphi, even executives is competitive with
10 other auto parts makers. Would that be true?

11 A. That's true.

12 Q. And would it also be true that
13 the United Steel Workers is not in a position,
14 today, to offer any evidence whatsoever, with
15 regard to whether or not the incentive comp
16 program up for consideration today, is
17 competitive or not with that of other auto
18 parts markers?

19 MR. BUTLER: I'd like to here,
20 propose another objection. I let the
21 first question go. As I said, this is
22 facts witness, not a representative. If
23 you want to ask the facts witness what
24 the Steel Worker's case is, that is, I
25 think, inappropriate. He's here to

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 testify about facts, and you're asking
3 him simply argumentative questions about
4 what the Steel Workers, as a matter of
5 their agreement will (indiscernible).

6 THE COURT: Well, Mr. Shaw has
7 submitted an affidavit about the adverse
8 affects that this program would have on
9 the negotiations and I think it is fair
10 to probe whether he is considered as the
11 negotiating representative for the
12 questions that are being asked of him,
13 so I'll deny that.

14 BY MR. SPRINGER:

15 Q. Let me see if I can read it
16 back, or even remember it. Is it correct that
17 the Steel Workers today through you, are not
18 in a position to offer any evidence with
19 regard to whether or not the incentive comp
20 program before the court today is competitive
21 with that offered by other domestic auto work
22 -- auto parts manufacturers?

23 A. That's correct.

24 Q. And would it also be true that
25 the Steel Workers are not in the position to

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 offer any evidence, with regard to whether or
3 not the compensation paid to Delphi executives
4 is competitive with that paid by other big
5 publicly traded companies? Is that also true?

6 A. Yes.

7 Q. Is it also true that the Steel
8 Workers are not prepared today to offer any
9 evidence with regard to whether or not the
10 incentive comp program that's up today is
11 competitive with that offered by other big
12 public companies?

13 THE COURT: Let me make sure,
14 you understand the question and my
15 ruling. When counsel saying, any
16 evidence, what I take his question, it
17 is not in this courtroom, but generally,
18 when you talk to your constituents.

19 THE WITNESS: Yes, I understand
20 that.

21 THE COURT: Okay, fine.

22 BY MR. SPRINGER:

23 Q. Okay. I'll try it again. If
24 -- is it true that the United Steel Workers
25 are not prepared, today, to offer any evidence

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 with regard to whether or not the incentive
3 compensation program up for consideration by
4 the court, today, is competitive with that
5 offered by other big public companies? Would
6 that be true sir?

7 A. Yeah, that'd be true.

8 Q. Now, as a union official, sir
9 is it true that you cannot support any request
10 for a key employee compensation plan in this,
11 or in any other labor transformation case. Is
12 that true?

13 A. I don't think that's true.

14 Q. Okay. Have you ever testified
15 -- excuse me -- Is it true that you can't
16 support any incentive compensation plan for
17 executives, when in the case the workers' may
18 be asked to make wage and benefit concessions?
19 Is that true?

20 A. The Steel Workers?

21 Q. Yes, sir.

22 A. (Indiscernible).

23 Q. Just one second, I have to
24 recheck my notes here. Let me ask you the
25 question this way sir. Are you prepared, as

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 you sit here today, to support a key employee
3 compensation program for Delphi's executives
4 under the current circumstances?

5 MR. BUTLER: Objection, it
6 calls for speculation.

7 THE COURT: Sustained.

8 BY MR. SPRINGER:

9 Q. Are you prepared, sir, to
10 recommend to anybody that the Steel Workers
11 support the application before the court
12 today, under any circumstances?

13 A. (Indiscernible).

14 THE COURT: No. Let me ask you
15 a little differently. Would you
16 categorically rule out ever supporting
17 the AIP that's currently before the
18 court, under any circumstances?

19 THE WITNESS: It's hard to
20 know, unless you know what's involved
21 with everything. I don't think you
22 could just take bets and say your going
23 (indiscernible). Obviously, I think
24 it's a combination of many key factors
25 improving the success, the bargaining

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2 with the union representing the --

3 BY MR. SPRINGER:

4 Q. And it -- and it's true that
5 with regard to a request for approval of a key
6 employee compensation plan. That from your
7 standpoint, if there is any form of payment
8 that looks like there's no shared sacrifice,
9 at least appears to your members that there's
10 no shared sacrifice, it obviously brings great
11 consternation and potential problems, right?

12 A. There's no doubt that the
13 membership is aware of this matter and it can
14 possibly make our job, getting a successful
15 labor agreement more difficult, if the
16 membership thinks that there's no shared
17 sacrifices.

18 Q. And is that -- is that one of
19 the reasons why you can't support the request
20 by the debtors to implement the KECP program
21 today?

22 A. Yes, that's one of the many
23 reasons.

24 Q. Okay. I have nothing further,
25 Your Honor.

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd

2 THE COURT: Okay.

3 MR. BUTLER: Can I have just
4 one moment?

5 THE COURT: Sure.

6 MR. BUTLER: I have nothing
7 further Your Honor.

8 THE COURT: All right. You can
9 step down Mr. Shaw.

10 MR. BUTLER: Your Honor, could
11 I have one moment?

12 THE COURT: Yes.

13 MR. BUTLER: Your Honor, I'm
14 advised with respect to the exhibits the
15 two exhibits which the debtors had
16 earlier raised objections -- objection,
17 with respect to exhibits 26 and 27, that
18 they have been withdrawn.

19 THE COURT: Okay.

20 MR. BUTLER: That, Your Honor,
21 would mean that all the exhibits in the
22 exhibit book are in, save exhibits 26
23 through 29 which have been withdrawn.
24 I'd like to move Your Honor to --

25 THE COURT: I'm sorry, 26 and

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 27 right?

3 MR. BUTLER: 26 and 27 just
4 came out. 28 and 29 were withdrawn
5 earlier.

6 THE COURT: Right. Okay.

7 MR. BUTLER: I'd like to move
8 to close the evidentiary record.

9 THE COURT: All right. No one
10 has any other evidence to present.
11 Okay, it's closed.

12 MR. BUTLER: I was wondering,
13 Your Honor, if we could do two things.
14 One, perhaps have a five minute recess
15 and two, get some guidance from the
16 court, on whether you want anything
17 beyond the briefs that have already been
18 submitted.

19 THE COURT: I don't need
20 further briefs.

21 MR. BUTLER: I meant -- I meant
22 just to wave oral argument beyond what's
23 been --

24 THE COURT: Yes, I'd like to
25 hear briefly from people, so let me take

1 DELPHI CORPORATION, ET. AL. 05-44481-rdd
2 a 10 minute break. And, so, I'll be
3 back at 4:15.

4 MR. BUTLER: Thank you, Your
5 Honor.

6 (Recess.)

7 THE COURT: Be seated. By
8 hearing oral argument, I'm not
9 encouraging people to repeat what
10 they've put in their pleadings, but just
11 to tell me what they think is most
12 important.

13 MR. BUTLER: If I have the
14 court's permission I'd like to make a
15 brief closing and then reserve to come
16 back after all the objectors.

17 THE COURT: That's fine.

18 MR. BUTLER: Your Honor, I
19 think it's an important exercise here to
20 recognize what this motion is and what
21 it is not. What the evidentiary record
22 has contained within it, and what it
23 does not. And, who is prejudiced and
24 who would not be prejudiced, as one
25 addresses this motion. Particularly

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2 under the Orion standard, particularly
3 under the exercises of this judgment
4 here. I've been doing this for
5 something like 27 years. I have
6 appeared on countless motions of this
7 kind and other major issues in large
8 chapter 11 cases. And, when you sit as
9 debtor's counsel and you come before the
10 court on the matter of executive
11 compensation, regardless of the facts,
12 it is an emotional and even inflammatory
13 exercise. And, what we had tried to do
14 in this evidentiary presentation and in,
15 what we believe, the evidentiary record
16 now represents, is a, we hope,
17 dispassionate and objective view of what
18 is before the court today. I will tell,
19 Your Honor, had this matter alone been
20 the components of the KECF without the
21 equity programs that, by the way, were
22 designed to come at the end of the case,
23 when everything was designed. That is,
24 nothing be paid until the end of the
25 case, under the equity emergence

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2 programs. This, most likely, wouldn't
3 have even come to the court in this
4 fashion, because much of it, what is
5 actually here now, I think is largely an
6 ordinary course. We indicate in our
7 papers that really the court can both
8 find this new in their course of
9 business and make an alternative ruling,
10 also in support of the debtors. But, I
11 do think it's important, Your Honor, to
12 start with what it is not. This is not
13 an increase in executive compensation.
14 This is not, as the UAW witness
15 suggested, the management taking a
16 profit. This is not the executives
17 jumping the gun. This is an attempt by
18 the debtors in the exercise of
19 reasonable business judgment to restore
20 part of the competitive structure that
21 has existed at Delphi since 1999. The
22 program that the debtors have had
23 included salary, benefits, long-term
24 incentive and short-term. And, yes,
25 under the evidentiary record, short-term

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2 didn't pay out on a number of those
3 years because the debtors didn't achieve
4 their plans. Some of the long-term
5 programs have paid out and there are
6 other long-term programs didn't, but it
7 was the entire program that, together,
8 as the evidence indicated, was necessary
9 to put -- all four pieces are necessary
10 to get to Delphi executives just to the
11 competitive median, not leading the
12 pack, not even being a third of the way
13 back in the pack, but half way back in
14 the pack if all four components are
15 available. And, all four components
16 were available in each of the pre-
17 petitioned periods. The fact and Mr.
18 Bogdnovich indicated in his testimony,
19 that these are not guarantees, they are
20 opportunities. And the availability of
21 those opportunities, although -- not
22 achieved in each of the years, every one
23 of the years, pre-petition. The
24 availability of the opportunities is
25 what creates the competitive

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2 environment, and allows the company to
3 go forward. So this is not a matter of
4 adding on. This is not a stay for pay
5 bonus, in fact, the stay for pay bonuses
6 that were in place pre-petition were
7 cancelled by the board of directors in
8 connection with this Chapter 11 case.
9 And, we didn't even know the statute,
10 having filed before October 17th, we
11 could have filed a (indiscernible) and
12 sought the stay for pay programs. And,
13 even though, many of the automotive
14 suppliers in chapter 11 today have those
15 programs in place. What we wanted to do
16 was to try to have programs that had
17 incentive opportunities in it. And, we
18 filed this on October 8th, at the
19 beginning of the case so that there
20 would be a fair understanding of the
21 attempt by the company, with its outside
22 compensation experts, to deal with that
23 competitive shortfall that, on average,
24 represents on a demonstrative basis,
25 about half, roughly, of what the

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2 structure was. The ordinary course,
3 basic structure was, for each of the
4 years Delphi has existed. And, in doing
5 so, and in negotiating with the
6 creditors committee, the debtors made
7 another business judgment, which was,
8 taking all the circumstances under --
9 into account, including all of the
10 circumstances relating to the objectives
11 in this chapter 11 case. The debtors
12 took the position with the creditors
13 committee, they would take a good
14 portion of the program that, would
15 simply, restore the executives to that
16 which they already had, and they would
17 put that off until the summer time, so
18 we could check the progress in the case,
19 talk about that, negotiate with the
20 committee. What we believe needed to go
21 forward now, or would be lost forever,
22 is trying to restore, at least, an
23 incentive program to identify the first-
24 half business plan, because, just as
25 happened at the end of last year, when

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2 we worked through the last part of last
3 year, without having a plan, then the
4 pressure was, well don't have a plan
5 retroactively, so the plan was lost. So
6 for the first four -- three months of
7 this case, our executives operated at
8 about half of what they had on a pre-
9 petitioned basis. So this is not adding
10 on, this is not increasing; this is an
11 attempt to restore. And, by the way,
12 when we talk about salary, which
13 represents about a third of that pie,
14 that normal chart, the fact is, all of
15 the executive officers of the company,
16 the top 20 or so of the company, all
17 took 10 percent pay cuts, effective
18 January 1st. Mr. Miller, who's in the
19 court room, gave up his salary effective
20 January 1st. Mr. O'Neil the president
21 of the company, gave up 20 percent of
22 his base salary on January 1st, in an
23 attempt to try to do the right thing in
24 the labor transformation case. But,
25 Your Honor, these 460 odd executives,

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2 that are part of, what we believe to be
3 an ordinary course program, operate, you
4 know, global Delphi. They are before
5 the court on this program because the
6 domestic operations, which involve
7 46,000 employees is clearly in front of
8 the court and is extremely important to
9 the operation of the business, but these
10 466 people, along with the other
11 executives that are solely in foreign
12 company, the foreign businesses, provide
13 global leadership to 185,000 people on
14 six continents. And the company has put
15 together a six month business plan, that
16 it has reviewed with the creditors
17 committee and reviewed with the board of
18 directors, and is by no means an easy
19 plan to accomplish, there was testimony
20 about the plan, what the expectations
21 were and the company needs to incent
22 it's management team to make the steps
23 towards that. Not because the company
24 is trying to give them something extra,
25 or add on, so that it will increase the

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2 hiring temperature in this case, again,
3 with respect to organized labor, here in
4 the United States. But so that the
5 company can, in fact, restore at least a
6 portion of what was lost in connection
7 with the filing. And, I think, Your
8 Honor, that is -- I think the first
9 issue that I think is most important.
10 The second comment that I would make is
11 that what we're measuring here, and what
12 the court is to balance in the Orion
13 test of our business judgment and
14 exercise on the courts on business
15 judgment, based on the evidence before
16 the court, is an evidentiary record that
17 is virtually, and maybe entirely
18 uncontroverted as to the way the program
19 is constructed, as to what the targets
20 are, as to what the amounts are, as to
21 whether it's competitive, as to whether
22 it's reasonable. No one has introduced
23 any evidence to challenge any aspect of
24 the program. And, in fact, the progress
25 committee has specifically approved the

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2 form and substance of the program. So
3 what the court is being asked to weigh
4 by the objectors, and I'll sit down in a
5 minute and come back later, is to weigh
6 an uncontroverted evidentiary record
7 that is, I think, full of evidence for
8 the court to have comfort that the
9 debtors have appropriately exercised
10 their business judgment, measured
11 against a difference of view, one that
12 we understand and took into
13 consideration, but a difference of view,
14 where the folks who represent our unions
15 and are creditors could rather say, gee,
16 wouldn't it be better for everybody if
17 these employees just didn't get, the
18 only employees the 185,000. These 466
19 employees work to restore at least a
20 part of what they had, as opposed to
21 giving anything up, restored to part of
22 what they had for the next six months or
23 eight months, until whenever we figure
24 we get to the end of the case. And if
25 we do that, then what with the

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2 announcement that this court's making to
3 the executives is, you're going to be
4 unlike any other employee of Delphi,
5 you're going to get about half of what
6 the opportunities are available to you
7 that were available in pre-petitioned
8 Delphi, while everybody else is getting
9 paid 100 percent of what they had
10 available to them?

11 THE COURT: Wait a minute, when
12 you say everybody else, you don't mean
13 the union's right?

14 MR. BUTLER: As we sit here
15 today,

16 THE COURT: Well, no but you
17 teed up for a hearing in front of me in
18 about a month and half. That proposal
19 is to reduce what they're getting by
20 more than half.

21 MR. BUTLER: And the evidence,
22 Your Honor, is going to show, and this
23 is one of the issues we have to deal
24 with, and sitting as the arbiter of our
25 business judgment, Your Honor has to

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2 deal with, is the uncontroverted
3 evidence and this record, is that the
4 actual performance, the actual pay on
5 place that the executives are getting is
6 about the 25th percentile.

7 THE COURT: Now, I was just
8 responding to the stay, I don't -- I was
9 trying to follow the statement, I didn't
10 mean to be specific.

11 MR. BUTLER: Well, because at
12 the other end of it, Your Honor, the
13 fact of the matter is in this case, and
14 I don't make the facts up here, I have
15 to be one of the people, with others
16 around us in this courtroom, to try and
17 solve the problem. But, the fact is
18 that our hourly work force are at
19 uncompetitive rates and that's what the
20 1113 process will show. And, somehow or
21 other, we have to fix both those
22 problems. But, we don't fix the
23 executive problem by saying, let's take
24 away half of their opportunities right
25 now, today. As a matter of fact, we

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2 took them away October 8th. Let's take
3 away half the opportunities for the
4 balance of the case and then -- and then
5 deal with the other issues later on.
6 And, ultimately, Your Honor, the court
7 knows this, I know this, having been
8 involved in labor transformation cases
9 throughout my career, we have to solve
10 the legacy obligations and the
11 uncompetitive labor costs in this case.

12 We're going to try very hard to
13 do it on a consensual basis, whether or
14 not we file an 1113. An 1113 is a piece
15 of paper and a process. But we both
16 know that congress requires at the end
17 of the day, that what we have to do is
18 settle this, finally, at a bargaining
19 table. And we will work hard to do
20 that, and our evidence has been very
21 clear. We recognize in the formulation
22 of this business, exercise in this
23 business judgment that the -- on the one
24 hand, trying to deal with a real and
25 pleasant problem that is effecting the

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2 reorganization of this case, which is
3 this sort of half of the pre-petitioned
4 loaf for executives, which is causing us
5 to lose executives, it's demoralizing
6 the executive rank. It is effecting
7 businesses not just in the United
8 States, but globally, because these
9 executives are responsible for the
10 entire global operations of the company,
11 that are doing that in order to try to
12 satisfy the -- the 1113 process in this
13 case. Simply, in the opinion of the
14 company, the business judgment of people
15 like Mr. Opie as independent directors,
16 is a recipe for disaster. And will lead
17 us to a -- real problems in connection
18 with the reorganization.

19 And so what the company is
20 trying to do here, is trying to strike
21 the balances. By agreeing with the
22 creditors committee to take off all the
23 long-term incentive plans and put them
24 at the back end of the case. By trying
25 to -- by being involved in almost three

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2 months of negotiation with the
3 creditor's committee and modifying the
4 programs so the form and substance is
5 acceptable to the committee, and take
6 those actions that the company is trying
7 to do all that it can to exercise
8 business judgment. And we recognize
9 that anybody can use this motion for
10 their own purposes and their own
11 strategic purpose in this case, but if
12 people view it for what it is, because
13 factually there can be no doubt that
14 what this is, is a restoration of
15 benefits that were taken away as opposed
16 to trying to field the lily or put icing
17 on the cake, or take things away from
18 people, or increase compensation, or all
19 those other things, which it is not,
20 Your Honor. Then, I think, the
21 reasonableness of the debtor's business
22 judgment here, is simply underscored.
23 We bid the record and the evidence is
24 uncontroverted in support of the motion.
25 And, I'll reserve the balance of the

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2 argument until the end, Your Honor.
3 Thank you.

4 THE COURT: Okay.

5 MR. ROSENBERG: Your Honor, I'd
6 like to begin with an important
7 preliminary point. And, again,
8 hopefully not borrowing the card, but
9 going over the procedure of what we are
10 doing here today. What we did here
11 today was hear one portion of a single
12 motion. A single motion which is still
13 pending, and which contains provisions
14 which will be heard down the vine,
15 presently in July, which the committee
16 and other parties may or may not support
17 in whatever form they end up being, or
18 end up being negotiated. I am very
19 concerned that no findings today, in
20 connection with this relatively modest
21 and small portion of that larger motion,
22 prejudice, that hearing down the line
23 we've had this issue before Your Honor,
24 whatever situations and modifications of
25 motions it is particularly important

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2 here that I ask Your Honor to please
3 keep that in mind when you make
4 findings, however you determine to come
5 out.

6 Again, Your Honor, this motion
7 was filed, I believe, on the first day
8 of the case, if not very soon
9 thereafter. It contained an enormous
10 compensation package of which this is
11 only a part, which this court with some
12 serious understatement, called a
13 lightening rod. It surely has been
14 that, and it continues to be that, as
15 Your Honor has heard. The timing
16 problem here, with due respect to the
17 data, is one entirely of its own making.
18 It, perhaps, could have filed this
19 program, certainly the program has
20 finally agreed to with the creditors
21 committee, early in the case and it
22 probably would have gone through with
23 very little controversy, had that been
24 the sum and substance of the motion.
25 But it wasn't.

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2 Nor is it true, Your Honor,
3 contrary to some statements that the
4 debtor has made, that the motion was
5 adjourned at the creditors committee's
6 request. That is not the fact. The
7 fact is that the creditors committee at
8 each adjourned hearing told the debtor
9 that it would object to the motion and
10 the debtor chose to adjourn and
11 negotiate, rather than have the
12 committee file an objection to the
13 program.

14 So, again Your Honor, we're
15 here one week before a deluged 1113 date
16 because of the procedures that the
17 debtor, at its discretion, chose to --
18 chose to follow. Now, you have heard
19 me, the committee, talk about three
20 problems with the annual incentive plan
21 as originally proposed. One was its
22 substance, its lack of gradual --
23 granularity, its lack of actually
24 incentivising performance on an
25 individual basis. We have solved that

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2 problem, Your Honor. As Mr. Butler
3 indicated, the plan put forth is
4 acceptable to the committee and its
5 compensation consultants, with respect
6 to this six month period. And again,
7 the point I'm making here, Your Honor,
8 is that it will be juggled, or jiggered
9 I should say, and the terms will be
10 slightly modified if they want our
11 cooperation or for six months period
12 going forward.

13 The second issue is the so-
14 called prophylactic issue. Making sure
15 that bad guys, if you will, do not run
16 off with incentive payments. We feel,
17 Your Honor, and obviously reasonable
18 people are free to differ, that the
19 present program, which Your Honor can
20 see is vast and different from the one
21 that was put forth to this court in an
22 affidavit even last week, properly
23 achieves the balance between protecting
24 the estate and its assets, on the one
25 hand, and not unfairly or unreasonably

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2 branding people simply because somebody
3 decides that they're bad guys before
4 anyone has a chance to adjudicate that.
5 We don't think that's fair, we think
6 that the proper balance has been
7 achieved here, obviously anyone is free
8 to differ with that, but there again, we
9 are satisfied that the right balance has
10 been achieved. That brings us,
11 finally, to the timing issue.

12 Your Honor, the creditors
13 committee, of course is the fiduciary
14 for the entire creditor body. It is a
15 highly representative committee. The
16 U.S. Trustee did an excellent job of
17 making that the case. The committee has
18 even, as Your Honor knows, expanded upon
19 that representativeness, by adding to
20 ex-officio members in the last couple of
21 weeks, the UAW and the PBGC. All major
22 unsecured constituencies have weighed in
23 on this issue of timing. We have also,
24 of course, heard the company's point of
25 view on the issue of timing. They're

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2 not our constituency, but we are
3 depending on them to make our
4 constituency as whole as possible. So,
5 they are hardly our enemies. We do want
6 them to be happy. That should go
7 without saying. I think it's fair to
8 say that we wrestled long and hard with
9 this issue, and heard out at great
10 length every one of those constituencies
11 and, on balance, it is our conclusion
12 that it is not a reasonable exercise of
13 the debtors business judgment to go
14 forward one week before an 1113 motion,
15 in terms of the main issue in this case,
16 which is and has to be labor peace. Are
17 we sacrificing one constituency at the
18 expense of another in making that
19 judgment, perhaps so.

20 But Your Honor, as Your Honor
21 knows, bankruptcy tends, in the final
22 analysis to be a zero fun game and these
23 hard judgments have to be made. I
24 listened to Mr. Grandstaff in particular
25 and his answers to your questions, I

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2 thought he was incredibly eloquent. I
3 have never met Mr. Grandstaff before
4 today, I have never spoken to him, but
5 he did capsulize the way that the
6 committee has analyzed these various
7 competing interests and how we have come
8 down, sitting here one week before an
9 1113 motion. Thank you.

10 MR. KENNEDY: Your Honor, Tom
11 Kennedy for the IUE. I'd like to
12 address a couple of points, especially
13 those made in the reply papers recently
14 filed by the debtor, two days ago. We
15 do not believe that this AIP program can
16 be construed as being in the ordinary
17 course of business. The original
18 proposition that was made, at the time
19 the motion was filed, on October 8th,
20 also called for a six month AIP with a
21 target cost of just over 20 million
22 dollars. That motion said nothing about
23 the AIP being in the ordinary course of
24 business. That argument wasn't raised
25 until two days ago. But Delphi was

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2 looking for a declaratory judgment that
3 the AIP was in the ordinary course, I'm
4 confident they're aware of the proper
5 procedure would have been a proceeding
6 under rule 7001. The format chosen in
7 the text of the original motion, as far
8 as we're concerned, I'm not trying to
9 elevate form over substance, but just
10 looking at that point, was this
11 originally intended to be an ordinary
12 course motion in our view. The answer
13 to that is no. But, more importantly,
14 than the procedure, the substance shows
15 how different the next six months are
16 intended to be, under this program, than
17 the prior years. And as Your Honor, I
18 believe, demonstrated an awareness of in
19 questioning some of the witnesses, the
20 Bogdnavich declaration, in paragraph
21 eight, is very clear that,
22 notwithstanding these charts that refer
23 not to money paid, but to opportunities,
24 the actual incentive progra -- payments
25 to the same group of executives, was

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2 zero in most of the last four years.
3 And in the one year in which they were
4 paid, 2002, were only a partial payment.
5 The issue here is the existence
6 of money versus no money. There may
7 have been an opportunity before, we
8 don't know what those opportunities
9 were, how well they were picked, or who
10 made the business plan, or what the
11 targets were, but we do know that there
12 was no money paid. And we know that
13 under this plan the expectation is
14 notwithstanding the suggestion that
15 there's reach in the plan, that it will
16 be paid. It's paid out after only 70
17 percent performance achievement by the
18 executives and we are now 40 days into
19 the period which they're contending is
20 going to be measured. If, at that
21 point, two things are true, the first
22 is; it's much more clear to the company
23 whether they are going to meet their
24 performance targets, and we think they
25 are, as has been suggested by the

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2 Bugdovich affidavit at paragraphs 10 and
3 11, where he's talking about the EBITDAR
4 performance actually being positive for
5 the first six months, is the company's
6 expectation. It's also true that just
7 from the sheer perception of is this
8 going to incentify people; we're already
9 20 percent into the period that they're
10 trying to incentifize. If the program
11 hasn't been installed yet, 20 percent of
12 it's potential impact is obviously --
13 been lost.

14 THE COURT: Well, except they
15 know the motion's been on file. I mean,
16 I have to assume that the executives are
17 acutely aware of this.

18 MR. KENNEDY: Well, if that's
19 the case, then we may have achieved 20
20 percent of its impact without having to
21 put the money on the table.

22 THE COURT: Yeah, but then when
23 you take it away, they have lost 40
24 percent.

25 MR. KENNEDY: Well, you can

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2 dandy the numbers about, but the reality
3 is 40 days into the period already.

4 THE COURT: Well, let me ask
5 you, because at -- at one level,
6 obviously, I shared some of your view
7 that, in some respect, this is a change
8 in that there was, in practical terms,
9 no bonus except for some portion of the
10 bonus in 2002, for the last four years
11 or five years. And, at the same time,
12 however, I think it's fair to say that
13 people, well not just MBA's, but people
14 generally feel that you get more value
15 for your dollar if its in the form of an
16 incentive program, then if its just flat
17 salary and it would be odd for a company
18 to set -- intentionally hard targets.
19 So, I was waiting to hear through the
20 whole hearing whether these targets were
21 believed by anyone to be you know, lay
22 ups, or whether its something that
23 people really have to work hard to
24 achieve and what I have in front of me,
25 is basically that it's not a lay up, as

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2 far as I can -- I have on the record.

3 That's -- maybe there's something you
4 can point me to in the depositions or
5 something else that suggests otherwise.

6 MR. KENNEDY: Well, Your Honor,
7 at page 14, paragraph 32 of the
8 Budgnovich deposition, I'll read you the
9 following. The corporate level EBITDAR
10 Ub target for the period ending June 30,
11 2006 is negative 80 million. Quote,
12 paren: A negative EBITDAR target for
13 purposes of an incentive compensation
14 plan is not unusual in my experience for
15 a company in chapter 11, end paren. I
16 understand that the company expects, in
17 fact, its EBITDAR will be positive, end
18 quote.

19 So, we believe, Your Honor,
20 that the period we're in, the negative
21 EBITDAR itself as a incentivising
22 device, I'll leave to those more
23 familiar with
24 business targets than I. I understand
25 that there are some people going to

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2 comment on that later. But, the
3 Budgnovich deposition indicates that
4 they are expecting a positive EBITDAR.
5 And whether this is a lay up or a little
6 bit of a reach, it's still a period,
7 since we're in too, in our view, its
8 well known to the company that they are
9 going to meet those -- those targets.
10 The issue in this case, in any event, is
11 not what I would call an abstract
12 analysis of how incentive plans work, or
13 how they might apply in a mythical
14 company. But, as we sit here today,
15 given the reality and proximity of the
16 1113 motion, is it good business
17 judgment to place a red flag in front of
18 the tens of thousands of individuals
19 that are going to be affected by that
20 motion. And let me note, Your Honor,
21 this is not the time to go into it, but
22 we do not accept, as an attorney for the
23 IUE that our hourly work force works at
24 uncompetitive rates. That's been said
25 many times, it's said as though its back

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2 drop, it's said as though it's a given.
3 It is not a given and we intend to
4 contest that if we have to in front of
5 an 1113 motion. But, as we sit here
6 today, we do know that the company is
7 planning for a number of our members,
8 and attempting to cut their salary in
9 half. And I don't think anyone needs to
10 dwell on how dramatic that would be for
11 anyone, no matter what their salary
12 level is. The working people who live
13 from check to check it's all the more so
14 then it might be for the executives. In
15 that context, unless a plan has an
16 extraordinary need for being, our view
17 it would be inappropriate to install it.
18 There's been no demonstration that
19 there's an extraordinary need to impose
20 this plan at this time. The status quo
21 has been no AIP payments as a practical
22 matter, and without over-dwelling on
23 that point, for some years now. Another
24 six months, another year without them,
25 if it achieves a substantial diminution

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2 of the executive class, there may be
3 other factors at work or I would assume
4 that there are other factors because
5 that same lack of an AIP has not driven
6 out a substantial number of executives
7 in the prior year. Why would you assume
8 that increase executive departures, to
9 the extent they've been demonstrated are
10 as a result of a lack of an AIP, when
11 there hasn't been one for the last four
12 years? We think it's highly significant
13 that, not only the unions, but other
14 stakeholders in the committee,
15 representing all of the stakeholders,
16 oppose this motion based on its impact
17 on the pending labor negotiations. The
18 reply B filed by Delphi, acknowledges at
19 page 4 the proceeding with the AIP,
20 could make negotiations with the unions
21 heart. Then they would have as, quote,
22 the dead is capitulated and agreed to
23 arbitrarily deprive their executive work
24 force of basic market-based
25 compensation, end quote

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2 We do not think there is
3 anything in this record that supports so
4 purple a description of the compensation
5 being paid to these executives. They
6 are at norms with respect to the salary
7 portion of their, and I suppose the
8 benefit portion of their compensation,
9 and the opportunities, as I've said
10 before, that they are being deprived of,
11 they haven't had as a practical matter
12 for years. The Delphi argued it was
13 speculative whether approval of the AIP
14 would endanger the critical negotiations
15 with the unions. It is speculative only
16 in the sense that it hasn't happened
17 yet. Seasoned labor negotiators have
18 all testified that it will be a serious
19 impediment for reaching an agreement, if
20 these plans are put into place. There
21 is no evidence to the contrary. The
22 company grudgingly acknowledged that it
23 would make it more difficult. The
24 position of the union negotiators is, it
25 will make it impossible. It's somewhere

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2 in that continuum, in any event, given
3 the centrality to this case of achieving
4 an acceptable consensual labor solution.
5 Anything that makes it harder should
6 have a substantial burden of
7 justification before going forward and
8 that is simply not something they've
9 met.

10 THE COURT: Let me ask you
11 then, why -- you say that -- but doesn't
12 that encourage people to be unreasonable
13 on the other side? And just say, well,
14 I'm going to be upset no matter what the
15 basis is and, therefore, doesn't that
16 prejudice the issue?

17 MR. KENNEDY: In the labor
18 negotiations, you're referring to?

19 THE COURT: Yeah.

20 MR. KENNEDY: Your Honor, no it
21 doesn't. The unions are fighting for
22 their lives in this case, Your Honor.
23 These are thousands of people in
24 communities that have very deep concerns
25 about what's happening here. This is a

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2 matter that will be an irritant, a
3 stumbling block, an impediment, perhaps
4 reaching to the point of rendering them
5 impossible to achieve an affirmative
6 vote, but it certainly not the only
7 thing people are going to be looking at.
8 We are not suggesting that it is. But,
9 this is way too important a decision to
10 have any one factor be entertained.

11 But again, what I think you
12 have to look at here and kind of
13 weighing this all together, isn't the
14 normal status of labor negotiations.
15 These are enormous cuts that the
16 employer is seeking to make in the labor
17 relations environment. We're going to
18 have a trial about whether they're
19 warranted or not, and I'm not going to
20 comment on it. But, we certainly know
21 that this is not the kind of situation
22 where an employer comes forward and says
23 we want to take away your cost of living
24 increase, we want to freeze your wages
25 for two years, and we want five dollars

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2 more toward the health care. There are
3 an awful lot of conversations that can
4 be had, and which we could not stand
5 here, honestly, and say the impact of
6 the executive -- the 20 million dollars
7 or up to 38 million dollars additional
8 monies being paid to executives is a
9 material element. But, that's not true
10 here. We can say that here, it's true.
11 There's no evidence to the contrary.
12 What we believe is that the risk would
13 ward alternatives to the debtor's
14 estate, which I think is something that
15 the court has to consider, are startle.
16 Let's assume that the debtors are right.
17 The motion -- we prevail. The motions
18 denied, either entirely or at this time
19 and the adverse consequences that have
20 been suggested by the debtor occur.
21 They lose some executives. There's a --
22 instead of 110 percent effort, they're
23 getting 106 percent effort from some of
24 their executives. They can, after all,
25 reward them with salary. They can reward

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2 them with evaluations. There are other
3 tools in the corporate for the employer
4 to deal with executives. But, and that
5 could have an impact on the estate,
6 we're not suggesting it couldn't. But,
7 it's a relatively minor impact. On the
8 other hand, if the motion is granted and
9 the objectors are right, that it is a
10 terrible time at which to enact this
11 particular plan, and the labor relations
12 are unsuccessful, and everything spins
13 out of control, and the debtor is unable
14 to successfully reorganize, the
15 risk/reward analysis suggests to us that
16 the -- it's decidedly against proving
17 this particular motion.

18 THE COURT: Well let me posit
19 another scenario, where it appears, on
20 an objective basis, that this addition
21 to compensation is warranted, generally.
22 That it is truly designed to get them
23 within range of what executives at
24 comparable companies make. But, that
25 for your timing reason and Mr.

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2 Rosenberg's timing reason it is not
3 approved in final form today. What's to
4 keep your clients and the other unions
5 from saying, oh, well that's off the
6 table, forget it, you're not entitled to
7 that. Even though, as an objective
8 matter, they are.

9 MR. KENNEDY: Well, a couple of
10 things, Your Honor. For one thing,
11 executive compensation programs are not
12 negotiable between labor unions and
13 employers. The --

14 THE COURT: I understand, but
15 in the negotiations that you want me to
16 defer this in light of, what's to keep
17 the unions from making this, in essence,
18 if it is, in fact, objectively
19 sustainable, a straw man issue, and
20 just, you know, a way to turn around and
21 gouge the company's eye with it.
22 Instead of focusing on the real, the
23 real things

24 MR. KENNEDY: Well,
25 (indiscernible).

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2 THE COURT: Going back to my
3 questions of Mr. Grandstaff, I can
4 understand, emotionally, and I'm not
5 playing -- I'm not in any way
6 denigrating emotions, because I think
7 emotion, people talking about their, you
8 know, their next pay check is probably
9 more important than logic in a lot of
10 cases. I know that this is hard for the
11 unions to swallow, but at the same time,
12 I do see a bit of a disconnect between
13 that point and a point that just says
14 well look, we're never going to approve
15 it. We're never going to let this
16 happen.

17 MR. KENNEDY: And, Your Honor,
18 we are not standing -- you're saying, we
19 are never going to let this happen. We
20 are suggesting to the court that the
21 consideration of this or of a plan such
22 as this, be put off until the conclusion
23 of successful labor negotiations and the
24 context -- and in the context of a
25 reorganization plan. In which there is

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2 an opportunity to focus on the future of
3 the enterprise where we know what
4 organizations and elements of this
5 company are going to be going forward as
6 Delphi. When we know which executives
7 are going to be important for the
8 continuation of the company, because
9 they're not going to be part of alms and
10 aspects of the company that are going to
11 be eliminated.

12 THE COURT: But over the next
13 six months aren't they -- these guys --
14 important no matter what?

15 MR. KENNEDY: Well, I think
16 they're important, Your Honor, but over
17 the next six months, in the midst of the
18 most important labor negotiations this
19 company will ever face, the negative
20 consequences of the program, in our
21 view, outweigh the incentivising aspects
22 that it might otherwise have.

23 THE COURT: Well, but are
24 those, ultimately, are those negative
25 consequences logically sustainable?

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2 MR. KENNEDY: They are -- if we
3 reach a point, Your Honor, in six months
4 from now, in which we are sitting here,
5 one way or another, having achieved a
6 different labor context in which the
7 company is operating, and in that
8 context the company is seeking to
9 introduce an executive compensation
10 programs that they think are
11 appropriate, going forward for all the
12 reasons behind the estate, then the
13 unions would look at that, I think, very
14 differently. I know my client would.
15 Then, they do not, since at that point,
16 we will have resolved the issues that we
17 are concerned, would be unresolvable, if
18 this program is put into affect. So,
19 again, Your Honor --

20 THE COURT: So you won't be
21 arguing with me that there's no reason
22 to incentivize them for the last six
23 months that have already been performed?

24 MR. KENNEDY: Well that's an
25 interesting point, Your Honor. I

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2 probably would argue that, Your Honor.
3 But, I don't you'd agree with me. So,
4 based on what we've said before. So,
5 let me just summarize, Your Honor,
6 because other people need to speak.
7 First, the approval of this program, we
8 think, will reduce the likelihood of the
9 agreements. The debtor didn't consult
10 with any of its unions in formulating
11 this plan. Which we think is
12 significant, and I direct your attention
13 to Geneva Steel Company, 236BR7 --

14 THE COURT: Wasn't Geneva Steel
15 all about stock options and emergence
16 bonuses and really --

17 MR. KENNEDY: Yes, it was, Your
18 Honor.

19 THE COURT: Okay.

20 MR. KENNEDY: There was an
21 incentive program, but a different kind
22 of incentive program, that's correct.

23 THE COURT: Okay.

24 MR. KENNEDY: We don't believe
25 this represents the exercise of sound

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2 judgment given all the factors we've
3 identified, which at the end of the day,
4 I think is the critical issue, and we've
5 cited in our briefs some cases
6 demonstrating that the appropriate time
7 for the consideration of this kind of
8 motion is after labor negotiations are
9 completed and a reorganization plan is
10 being formulated. We think there's no
11 necessity. And, finally, Your Honor, we
12 do think this motion should be denied as
13 a matter of equity, fairness, and the
14 appearance of justice. This is a very
15 well-known confrontation, if you want to
16 use that word, that we think its
17 incumbent upon the court to consider the
18 impact upon the entire spectrum of
19 people interested in Delphi of an
20 approval of this motion. We think it
21 will be the wrong signal to all of the
22 participants, and we would urge you to
23 consider that impact as well. Thank
24 you.

25 MS. CECCOTTI: Good afternoon,

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2 Your Honor, Babette Ceccotti for the
3 UAW. I don't think I can do better than
4 the UAW's witness, frankly, but I will
5 try to summarize, particularly, in light
6 of the colloquy with the last couple of
7 -- the last couple of speakers.

8 Mr. Butler and his colleagues
9 are calling this a labor transformation
10 case. We know what that means. It's
11 sort of short-hand for a case in which
12 the debtor is focusing its
13 reorganization, very substantially, on
14 cutting labor costs, as they put, their
15 legacy obligations as well. And, that
16 the workers are going to asked to make
17 deep and significant economic
18 sacrifices. In the words of the
19 creditors committee, which we think is
20 completely on the mark, life changing
21 sacrifices. And, it means that the
22 unions must be fully engaged in a
23 process that will be difficult and will
24 be complicated.

25 And, we hope that everyone in

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2 this room shares our view, that a
3 negotiated solution of these issues is a
4 far better result for this case than the
5 alternative. The union's case, as
6 you've heard, is that the AIP bonuses
7 are disruptive of that process. They're
8 disruptive of the process of trying to
9 reach a consensual resolution. As
10 complex as that process already is,
11 adding this element to -- by this
12 element I mean, approving the bonuses
13 today for the executives will make it
14 even more difficult for the unions to
15 reach a negotiated solution that will
16 have the support of the UAW membership.

17 I think that is really the key
18 element of what each of the unions is
19 saying here today. Bringing up the AIP
20 at the very same time, that the company
21 is -- it's practically now colliding
22 with the 1113 motion that the company
23 says it's going to file at the end of
24 next week, as other speakers have noted.
25 This creates, what Mr. Grandstaff called

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2 a clashing in its message to the
3 workforce. The membership that this
4 union, the UAW and the other unions,
5 have to communicate with, in order to
6 try to translate everything that is
7 going on in this case, in terms of the
8 legal system of what the bankruptcy --
9 what the bankruptcy laws allow the
10 debtors to attempt to do. In terms of
11 the very, very complicated and difficult
12 economic issues. That the union is
13 going to have the very tough job of
14 trying to distill, if you will, for the
15 worker's who are coming to work every
16 day and working for Delphi.

17 The debtor's case is a case
18 about executive compensation. Most of
19 these key employee plan cases are about
20 executive compensation. They have the
21 element of consultants coming in and
22 with charts and peer groups, and we've
23 had discussions today also about how the
24 targets work, and what they are. And,
25 all of this is in the realm of how one

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2 designs an executive compensation
3 program.

4 I think what you heard Mr.
5 Grandstaff saying is, that this is not
6 how the worker's are looking at this.
7 Right? The workers are thinking about
8 the very real consequences to their
9 lives of concessions. The level of
10 concessions that the debtor's are asking
11 about here. They're not debating
12 whether the, sort of, unpronounceable
13 targets are right, or whether the peer
14 group is right. They're looking at this
15 and they're saying I have financial
16 insecurity here. I am looking at
17 serious financial insecurity here, but
18 here are executives being paid money.

19 THE COURT: You know, I know
20 that that's a good talking point, but I
21 actually think people are a lot smarter
22 than that. They know, by now, that the
23 issue that I have to decide, ultimately,
24 is one that comes down to this, and
25 which the unions, I understand, dispute:

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2 the debtors are saying that we can't
3 compete without these cuts. And, I
4 think, every American worker knows that
5 issue and in their heart of hearts they
6 know that competition is the key point
7 in this whole dynamic. So, I'm having a
8 hard time accepting that, unless, you
9 know, you've had six or seven beers, and
10 you're really pissed, that the mere fact
11 that an executive is getting more money
12 is going to, you know, be the deciding
13 factor here. If it is all put in the
14 context of what makes the company
15 compete better, why is that such a hard
16 message? I mean, among other things, I
17 was just reflecting on the union's point
18 about whether the target's a lay up. If
19 it is a lay up, and in fact their
20 performance is going to exceed it,
21 instead of being 80 million EBITDAR UG,
22 negative, they're positive, doesn't that
23 mean that they can, that the company is
24 going to take less from the
25 workers? Because it's the same business

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2 plan, and if the demands from the
3 workers are based on an 80 million
4 EBITDAR UG negative business plan and
5 they achieve, you know, ten million
6 EBITDAR plus, doesn't that mean they
7 have to ask
8 less from the workers because they're
9 more competitive? I just think that, I
10 understand there's rhetoric, I
11 understand that it comes up in a labor
12 negotiation, but ultimately, it's over
13 whether you're competitive or not.

14 MS. CECCOTTI: Your Honor, let
15 me try to answer the question this way.

16 I think that there are two,
17 really two issues, kind of mixed in
18 here. Well, there's a lot of issues
19 mixed in, but, I think, in terms of your
20 question, there are two basic issues
21 mixed in here. One is a sort of short
22 term practical reality and the other is
23 a more longer term question. And, the
24 short-term practical reality is what we
25 are attempting to convey here today.

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2 The timing issue is, in fact, a very
3 practical short-term problem. The
4 debtor's have this time table that
5 they're on, and all of that is going to
6 start happening in a litigation way, I
7 suppose, next week. So, I think it's
8 fair to assume that the parties are
9 having to deal with that fact, okay.
10 And having to deal with that fact both
11 in short-term reality, real-time basis
12 and, at the same time, in the long-term
13 to get to, what I think everybody here
14 would agree would be the goal, which
15 would be a successful Delphi
16 reorganization that's competitive and
17 provides job and financial security.
18 So, I think, today, however,
19 particularly since we're talking about a
20 program that is now being offered to you
21 on a short-term basis, it is appropriate
22 to look at the union's -- what the
23 unions are saying, is they're very real
24 short-term problem.

25 THE COURT: Well, but I don't

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2 know when people get over that. I mean,
3 ultimately, and I know you've done this
4 a lot, the fairness that I'm supposed to
5 have to look at, ultimately, I think, is
6 based on a type of record that's put in
7 front of me today, which is, you know,
8 objectively, does this make the company
9 stronger or weaker and is everyone
10 sharing the appropriate amount of pain?
11 Not sharing pain, but the appropriate
12 amount. So, I just hope that -- I
13 understand that there's explaining that
14 people have to do, but I don't -- I hope
15 that a request for an adjournment is not
16 just putting off the day when people
17 have to do explaining. And, my guess
18 is, that they've already done a lot of
19 explaining, because it's been done in
20 countless cases involving 1113 in the
21 past.

22 MS. CECCOTTI: Your Honor, let
23 me just make -- I'm sorry I didn't mean
24 to cut you off --

25 THE COURT: That's fine.

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2 MS. CECCOTTI: Okay. Let me
3 just, when we filed our objection some
4 months ago, back when the debtor filed
5 its papers, I guess I papers were due in
6 mid-November some time. You may notice
7 a reference to, sort of, the tone of
8 which this case started. And, it was
9 unfortunate. And, it was viewed very
10 much so, as an attack -- direct attack -
11 - on the worker's contracts and the
12 worker's working lives, really. The
13 tone was really unfortunate. I think
14 that we have gotten a bit beyond that,
15 but I'm not sure that the effects of all
16 of that poisoning of the well, I'm going
17 to call it for lack of a better word,
18 are necessarily gone. And so, we have
19 overlaying all of these complex issues,
20 and there are lots of them, the way this
21 case started, the way it's been moving
22 along to get to this point, again, where
23 the debtor is saying February 17th,
24 that' it. We're going to start a
25 litigation process. Whatever else, we

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2 may be doing, we're going to start a
3 litigation process. And, right in the
4 middle of all of this, with all of that
5 history, we have a request to pay
6 executives 20 to 30 million dollars.
7 So, I -- I hear what you're saying
8 Judge, but I think that taking a look at
9 how this case started, and it's been
10 mostly about the labor issues, just in
11 terms of the way we call it -- what we
12 call it. We call it the labor
13 transformation case, right? That's what
14 the case is about. I think, that a
15 debtor's request to come in and pay
16 money, I'm not going to get into the
17 debate about whether it's an increase or
18 not an increase, or a profit or not a
19 profit, I think all of that is -- does
20 not really get to the direct perception
21 that we are talking about here today
22 that's the problem. On the one hand,
23 you have workers worried about the
24 uncertainty of what this means up to
25 this moment in time and what's going to

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2 happen on the 17th, and is there going
3 to be an agreement, and is there not
4 going to be an agreement, and knowing
5 today, let's say, if, Your Honor, were
6 to sign the order, that -- put aside the
7 fact that its in six months, the
8 executives are going to get 20 to 30
9 million dollars. That just creates, for
10 these unions, an extremely difficult
11 practical problem. It is a short-term,
12 I won't say issue, in the sense of it
13 goes away once there's an agreement.
14 Maybe it does, maybe it doesn't. When
15 you have an agreement, you have a
16 completely different world. You have
17 people that understand what's in front
18 of them. You have people that can see a
19 path towards, hopefully a way out of
20 this case, as Mr. Grandstaff said, in a
21 way that makes the company successful.
22 It's a different environment; you just
23 look at things differently than you do
24 when you're right in the middle of the
25 eye of the storm, if you will, the

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2 uncertainty.

3 THE COURT: Okay.

4 MS. CECCOTTI: I did want to
5 say, finally, Judge, that I think that
6 the Geneva is instructive because, I
7 think that Geneva is a timing case, if
8 you really look at it that way.

9 MR. PETERSON: Good afternoon,
10 Your Honor, Lowell Peterson from Meyer,
11 Suozzi, English & Klein for the Steel
12 Workers. I think we've all focused on
13 the, sort of, long-term reality of this
14 case, which is a euphomism, and that is
15 a labor transformation case. This has
16 been -- this case has been presented as
17 the -- one of the largest, if not the
18 largest manufacturing bankruptcy in
19 history, the target is to restructure
20 the business in a number of ways, which
21 involve, according to the debtors,
22 enormous sacrifices by the hourly
23 employees. Both in terms potentially,
24 of losing their jobs as plants are
25 closed or aspects of the operation are

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2 shuttered, and in terms, facing enormous
3 pay and benefit cuts, including the
4 prospect of retirement without benefits.
5 I think there's been a notion that
6 somehow, and I understand it, that
7 somehow the employees, the workers if
8 you will, are reacting irrationally, and
9 that they should recognize, in some way,
10 that competitiveness is a good thing.
11 And, I actually think that, that misses
12 the point. I don't think there really
13 is anything irrational about the
14 reactions of the hourly employees, and
15 there's actually no evidence in the
16 record to rebut the extensive testimony
17 of the union folks who have had
18 experience with this stuff. I mean, Mr.
19 Shaw from the Steel Workers has been
20 through numerous bankruptcies with
21 executive compensation programs, and
22 without. And, there is a world of
23 difference. So it is -- it is, sort of,
24 true through historical experience, that
25 this kind of program makes it that much

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2 more difficult to come to a consensual
3 resolution in a quote, labor
4 transformation, end quote case. Which
5 means that the workers have to take a
6 lot of money out of their pockets.
7 That's what labor transformation means.
8 It's not a structural thing; it's a
9 direct sacrifice by these folks. It is
10 simply true, as a matter of experience,
11 that, that's what happens in these
12 cases. Whether we think it's a good
13 thing or a bad thing. That is the way
14 people react and they; frankly, I think
15 it makes some sense. I know Mr.
16 Springer and his cross examination of
17 the various union witnesses, sort of,
18 struggled mightily to get them to say,
19 isn't it true that there's no way you
20 can ever agree to any key employee
21 compensation program. And, they all
22 said no, that's not what we're saying.
23 There's no ideological imperative here.
24 There's no -- to use Mr. Butler's
25 phrase, there's no -- nobody's using

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2 this for strategic purposes to wrestle
3 some kind of constraints, this is --
4 we're dealing with a reality of what its
5 going to be like to go to union meetings
6 and try to get contracts ratified.
7 That's what we're talking about. This
8 is true. This is not speculation. This
9 is not strategic advantages. This is
10 what happens in the real world. And in
11 the real world, all of these unions have
12 been through labor transformation cases.
13 They've been through restructurings.
14 They know what its like; they know what
15 the members look at. They know what
16 companies look like. And, it is
17 certainly the case, as the witnesses
18 suggested quite, declining to say yes to
19 Mr. Springer's continued insistence,
20 there are plenty of reorganization cases
21 in which the executives share the bounty
22 as well as sharing the sacrifices.
23 We're just not at that stage. This,
24 right out of the box -- this case has
25 been about trying to wrest enormous

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2 concessions from the employees, and that
3 is not the time to start talking about
4 increasing pay for executives. And, as
5 I think the evidence is clear, we are
6 talking about the increasing pay for
7 executives, because that's where we're
8 going with this. The evidence that the
9 debtor's themselves produced, indicate
10 that there haven't been these payouts in
11 the past, there haven't been payouts in
12 '01 or '03 or '04, and there was a
13 partial payout in '02. And, that makes
14 some sense. I mean, after all, isn't
15 the concept of incentive pay to be paid
16 for performance? This is a company
17 that's nose-dived, according to
18 everything the debtor's have told us.
19 You get paid for performing well, not
20 simply for showing up and not screwing
21 up too badly. The concept of pay for
22 performance means that the performance
23 has to be good. And, the unions are
24 familiar with many corporations and have
25 good collective bargaining relationships

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2 with many employers in which the
3 executives are incentivized. And, in
4 which, when the company does well, they
5 get paid more. The executives get paid
6 more. That is not a problem that the
7 union members have with this. The
8 problem is that that's not where Delphi
9 is.

10 THE COURT: Well, why is that?
11 Based on today's record?

12 MR. PETERSON: Why is --

13 THE COURT: Then why do they
14 have a problem, based on today's record,
15 with this incentive program?

16 MR. PETERSON: Because the
17 people are getting paid even with
18 negative EBITDAR.

19 THE COURT: Well, a lot of
20 companies in bankruptcy are hitting a
21 home run if they raise the negative
22 EBITDAR from, you know, 200 negative to
23 50 negative. I mean, that's a good
24 thing in bankruptcy often.

25 MR. PETERSON: Well, it is a

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2 good thing, but it is certainly a long
3 way from taking this company to where it
4 needs to be. I would just -- I suppose
5 echo what my predecessors have said, and
6 that is there, will there come a stage
7 in this case in which the worker's feel
8 comfortable that, in fact, we're looking
9 at the light at the end of the tunnel,
10 in which things are going to turn
11 around?

12 THE COURT: Yeah. I'm --

13 MR. PETERSON: But, we're not
14 there yet.

15 THE COURT: I'm assuming,
16 though, that your clients have reviewed,
17 although they probably haven't finalized
18 their review, of the debtor's financial
19 information that they've been providing.
20 I mean, are these targets bogus, or are
21 they real, in light of that review?

22 MR. PETERSON: Well, I don't
23 know exactly what you mean by bogus.

24 THE COURT: Well, are they --

25 MR. PETERSON: Are they

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2 achievable, yes. They are very

3 achievable, in fact the --

4 THE COURT: Well, are they lay-
5 ups or is it really something that is
6 comparable to the other types of
7 incentive programs that unions have been
8 comfortable with, that you mentioned.
9 Like, you know, are they like that?

10 MR. PETERSON: Well --

11 THE COURT: The targets in
12 those programs.

13 MR. PETERSON: In this historic
14 context, the fact is, that these
15 executives have not received payments,
16 even when the company was out of
17 bankruptcy. So, from the perspective of
18 the unions, yes, they are lay-ups in the
19 sense that now, when the company is
20 doing particularly poorly, executives
21 will be getting 20 million dollars,
22 where for the past five years, when the
23 company was not in bankruptcy, they
24 didn't. So, in that sense, yes, it is a
25 different way of doing business, and

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2 these executives are going to be getting
3 rewarded where, in the past --

4 THE COURT: Is it only --

5 MR. PETERSON: -- they showed
6 they wouldn't be.

7 THE COURT: Is it only in that
8 sense?

9 MR. PETERSON: Is it only in
10 that sense? I would say that its -- I
11 would say that you're correct that
12 people have informed an arithmetically
13 precise determination about whether 80
14 million negative or 90 or 20 million is
15 a better target. I would say that that
16 level of analysis hasn't been done. I
17 don't think that that is positioned in
18 this reorganization process that the
19 unions find themselves in. Or that the
20 union members find themselves in. It
21 could be that there is --

22 THE COURT: Yeah. In other
23 words, they haven't gotten to that point
24 yet.

25 MR. PETERSON: No.

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2 THE COURT: Analysis of the
3 business plan.

4 MR. PETERSON: No, I don't
5 think the business plan is necessarily
6 to that point itself. There is a short-
7 term business plan, but as we understand
8 it, the longer term program for taking
9 this company out of chapter 11 is --
10 it's in very preliminary stages.

11 THE COURT: No, but as to the
12 six month targets, that's really what I
13 want to focus on. It has been pretty
14 well vetted?

15 MR. PETERSON: I can't give you
16 the answer to that, Your Honor. I
17 haven't asked that question to my
18 clients.

19 THE COURT: Okay.

20 MR. PETERSON: I think what --
21 there is a -- there's some additional
22 problems that need to be pointed out
23 though. In addition to the, sort of,
24 concrete and unrebutted experience that
25 the unions have had with these kind of

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2 programs, let's look at what, in fact,
3 these executives have been paid. And,
4 we have some exhibits that are in the
5 record that are in this, sort of,
6 separate binder, that suggest that some
7 of the arguments that company's made
8 maybe hasn't emphasized quite so much
9 today, but it's all over its motion
10 papers, which is that their executives
11 are running for the doors because pay is
12 so uncompetitive, and their current pay
13 structure is too low. People want to
14 leave because they can make more money
15 elsewhere. What those numbers don't
16 include is substantial amounts of money
17 that were actually paid to these
18 executives in 2004. And, in fact, if
19 you look at the documents that were
20 presented to us in discovery, you will
21 see that the executives were paid lots
22 more money in 2005, the failure year, if
23 you will, and then they were in 2004.
24 So the factual predicate that somehow
25 these executives had been hurting for a

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2 long time, and they have to have their
3 opportunities expanded, might some good
4 in the abstract. But, it isn't
5 factually accurate. There were
6 substantial wage increases across the
7 executive ranks, across the ranks of the
8 executives who have been identified as
9 targets of this AIP. For example, in
10 Band G, the average increase was 25
11 thousand dollars a year, in January 1,
12 in January 2005. There was a cancelled
13 deferred compensation program which
14 resulted in enormous payments. Hundreds
15 of thousands of dollars of payments in
16 many cases. There were 24 executives
17 who got more than 100,000 dollars each.
18 Four got more than 500,000. One of them
19 got a million seven. Now, canceling a
20 deferred compensation plan means that,
21 that plan is not there, but in a
22 bankruptcy context --

23 THE COURT: Is that a stock
24 plan?

25 MR. PETERSON: I'm sorry.

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2 THE COURT: Was that a stock
3 plan?

4 MR. PETERSON: No, that was not
5 a stock plan, as far as I understand it.
6 The stock component of their
7 compensation is, still shows up on the
8 sheets as income to them. I think we
9 would all concede that the actual value
10 of Delphi stock is something that's sort
11 of up for grabs at this point. But a
12 def -- in bankruptcy, of course,
13 deferred compensation plans, are not
14 bested plans, they're not a risk or
15 regulated plans. Frequently, any claims
16 under those plans disappear or become
17 general in secured claims. So, that was
18 a lot of money that these executives
19 received. So, the concept that somehow
20 there's a rush for the gates, or these
21 executives are going to be -- have low
22 morale, because of these unconscionably
23 low compensation schedules is simply
24 belied by the record. I want to also
25 suggest that a central feature of the

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2 pleadings mentioned, or touched upon by
3 debtors in their oral argument today, is
4 that you've got underpaid executives and
5 overpaid workers. That is simply not
6 true. And the fact that this issue
7 continues to be framed in that way, I
8 think, continues to set the wrong tone,
9 to pick up Ms. Ceccotti's argument in
10 this case. It is when we get into the
11 proper forum for addressing this alleged
12 -- allegedly over paid workforce. We
13 think the evidence will convince Your
14 Honor, that that's a vast overstatement.
15 We are still looking for that guy who
16 makes 65 dollars an hour to cut the
17 grass. We haven't found him yet. I
18 don't think he exists.

19 THE COURT: Well, leave that
20 aside. Where is the evidence that the
21 executive are not underpaid on today's
22 record?

23 MR. PETERSON: I think the
24 evidence that they received substantial
25 money that wasn't presented to the court

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2 in the analysis is evidence of that or
3 is determined to the know? I do think
4 that it's true, it's fair to say that
5 our central argument is not a market
6 argument, is not a competitiveness
7 argument. It's not an argument that at
8 no point in the future should these
9 executive salaries be looked at, and
10 considered in the context of an overall
11 plan for rehabilitating this company. I
12 think our central argument is that, if
13 the central goal of this case is to
14 extract large wage and benefit
15 concessions, there's no reason to light
16 this fire, at this time. This is simply
17 not the appropriate approach. Because,
18 like it or not, the members get to vote
19 on changes in their contracts. And,
20 this is not something that's stirred up
21 by the unions, this is something the
22 unions -- that member bring to the
23 unions and we've seen in case after case
24 after case. And, at this point in time,
25 these kinds of payments to executives,

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2 in this context, when there simply isn't
3 any sense of where we're going as a
4 company, where these workers paychecks
5 will come from in the future, and what
6 they're going to be. This is not a
7 time, as I say, to light that fire.
8 And, I think that's really the central
9 argument we're making. And, again,
10 we're not saying never. We're just
11 saying that this too much at this stage
12 in the context of the 1113 motions, and
13 the enormous set of proposals. The
14 enormous cuts proposed by these debtors
15 in this case, that the debtors have not
16 backed off from, have suggested that
17 they're interested in continuing to
18 pursue rejection of the collective
19 bargaining agreements on a defined
20 timetable. I mean, that horse is out of
21 the barn. It's marching down the path.
22 In that context, we suggest that this is
23 not an appropriate time to grant the 20
24 million dollar AIP.

25 THE COURT: Okay.

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2 MR. PETERSON: Thank you.

3 MR. FOX: Good afternoon, Your
4 Honor, Edward Fox from Kirkpatrick and
5 Lockhart on behalf of Wilmington Trust
6 Company, as indentured trustee for the
7 company's senior debt and senior notes
8 and debentures. Your Honor, I'll be
9 very brief. Wilmington Trust shares the
10 view of the committee, as expressed by
11 Mr. Rosenberg. But, I would take a
12 minute to just put it in a little bit of
13 perspective. If you recall, we were
14 here on November 29th, on the debtors
15 supplier agreement assumption procedures
16 motion. And, at that point, the debtor
17 asked for permission to pay suppliers if
18 need be, portions of their pre-
19 petitioned claim as part of the
20 assumption of their contracts going
21 forward, out of concern that if the
22 vendors failed to supply the company
23 going forward, failed to -- or refused
24 to do business with the company going
25 forward, that it could cause substantial

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2 disruptions in the supply chain and that
3 it could cause the debtor damages of, I
4 believe it was as much as 10 million
5 dollars a day, if they failed to supply
6 their customers as they were required to
7 do. It seems to us that the hourly
8 employees, who are as much a part of the
9 supply chain as any of the vendors, and
10 if they fail to show up one day for work
11 because they are standing outside the
12 gates picketing, rather than having
13 ratified an agreement, that the
14 magnitude of harm would be similar
15 there, as would be if the vendors failed
16 to supply. We are guided by the
17 testimony and the evidence that we've
18 seen from the unions, with respect to
19 their concerns, not about negotiations,
20 but about ratification. And, that's
21 where our concern is. When we balance
22 the potential harms that could occur,
23 one verses the other, of being -- them
24 being unable to ratify an agreement
25 verses the harm that might come, or the

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2 benefit that might be gained from having
3 the attitude that this point in time, we
4 end up coming down on the side of
5 waiting, at least until a little later
6 in the process, rather than doing this a
7 week before the 1113 process begins.

8 THE COURT: Okay.

9 MR. FOX: Thank you.

10 MR. BECKWORTH: Your Honor,
11 Brad Beckworth again, on behalf of the
12 Oklahoma Teacher's Retirement System,
13 Mississippi Public Employees Retirement
14 System, Refesa and ABP. Your Honor, we
15 are mindful and indeed very respectful
16 of the importance of the issues that are
17 at stake today. And, I want just to
18 make clear to the court, that it is not
19 our purpose in objecting to object to
20 the fact that there is an AIP or KECP
21 proposed. It's not our objection that
22 we should never have one for Delphi. We
23 don't take a stake in that at all.
24 That's for other folks. What we have
25 done, Your Honor, and what I think the

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2 record shows today, is show that there
3 are some significant aspects in where
4 the proposed plan falls short of what
5 needs to be done. And, one of the first
6 things I would like to turn to Your
7 Honor, is the court's decision, Judge
8 Gonzales' decision in re Enron, the
9 bankruptcy case that was pending here in
10 the Southern District. In the debtor's
11 response that was filed a day or two ago
12 to all -- collective response to all of
13 the objections, in paragraphs 91 and 92,
14 the debtor cited Enron two decisions by
15 Judge Gonzales in reference to their
16 prophylactic measures. I read that
17 opinion, and I asked some questions
18 regarding it, at the very beginning of
19 my cross examination of Mr. Webber, and
20 I find it instructive. In that case,
21 Judge Gonzales refused to allow
22 participation in the program that was at
23 issue there in several very important
24 regards that we don't have here. First,
25 Judge Gonzales did not allow anyone to

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2 participate in the proposed plan, if
3 they were a named defendant in the
4 pending securities litigation brought by
5 the California pension funds, against
6 Enron. Second, The Court did now allow
7 participation by anyone who had been
8 found to be a wrongful actor by Enron's
9 in-house investigative committee, or
10 special investigative committee that was
11 used there to determine what was going
12 on. Third, Judge Gonzales did not allow
13 anyone to participate if the independent
14 examiner that was used in Enron, found
15 that anyone had acted with dishonesty.
16 And, fourth, and particularly relevant
17 here is, The Court did not allow
18 participation or, in fact, required
19 forfeiture, if anyone who was a
20 participant under that program, was
21 ultimately found to have acted with
22 dishonesty against the best interest of
23 the company. And that was the standard
24 by any court of competent jurisdiction,
25 and that includes, I believe Judge

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2 Harmon's court is dealing with the civil
3 litigation that's going on, in that
4 case, down in Houston and the Southern
5 District of Texas. I asked Mr. Webber
6 if the current program being proposed,
7 or what we are dealing with today, has
8 any of those provisions in it. And, the
9 answer was, no, they don't. Your Honor,
10 at a minimum, if Delphi is going to rely
11 upon that case for any precedent, we
12 believe that any program that is at
13 stake here should have requirements such
14 as those. That's the kind of thing that
15 we've objected to, that it didn't have
16 those safeguards. Now, we have a great
17 deal of respect for the fact, that for
18 whatever reason, whether it was in
19 December or after Your Honor's comments,
20 whenever it occurred, that the debtor
21 and the creditor's committee have gotten
22 together and discussed prophylactic
23 measures. We think that is a step in
24 the right direction and we applaud that.
25 We do find, though, that there are some

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2 things that we believe fall quite short.
3 And, I have to go back to one thing
4 before we get to that. First, we have
5 shown, I think, in the record, that the
6 compensation committee that was in
7 charge with drawing up and negotiating
8 the various aspects of this program, we
9 don't think they did an adequate
10 investigation about the allegations that
11 are going on with this company. In
12 fact, we believe they did no
13 investigation at all. Now, Your Honor,
14 there's been a lot said about the
15 allegations that we have raised in our
16 securities litigation, our objection
17 here. But, I would like to turn this
18 court's attention, that there's a whole
19 other body of allegations that have been
20 raised here. There's a restatement by
21 this debtor. There's an investigation
22 that is ongoing that has had some
23 conclusions already by its audit
24 committee with the help of PWC and
25 Wilmer Cutler help, was hired by them.

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2 There's the SEC's investigation and, I
3 think it was Wednesday, when we were in
4 court with Judge Rosen in Michigan; the
5 U.S. Attorney was there with several
6 former employees from Delphi being
7 represented by criminal defense counsel.
8 And, the court met in chambers with them
9 about that, we don't know what all was
10 said. The point is, there are a lot of
11 investigations going on. We believe,
12 especially with respect to the audit
13 committee's finding that the debtor has
14 available to it, a wide body of
15 information upon which it can determine
16 whether certain people, that are
17 currently eligible to participate in
18 this program, shouldn't be there. In
19 fact, Your Honor, we think that they
20 have, quite likely, in the findings of
21 the audit committee, we don't know what
22 standard they used, but we believe that
23 there may be findings in the audit
24 committee's reports, regarding a
25 culpability standard about people that,

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2 using the standards we talked about with
3 Enron and some of the questions that we
4 asked that they regard in their claw-
5 back procedures, people that under that
6 standard shouldn't be there. We have
7 looked at one of the statements that
8 Delphi's made in some of it's papers
9 that says, with respect to complaints
10 about wrongdoing, the worse thing that
11 we can do is ignore them, do nothing and
12 allow them to grow worse. I think that
13 comes from their code of conduct. Your
14 Honor, we submit to the court that, that
15 is precisely what the debtor has done
16 with respect to the compensation
17 committee's view and review of the
18 allegations that have been raised
19 against eligible KECP participants.
20 Now, I won't go into the names or any
21 identities or even numbers, but I think
22 the records will show that there are
23 current, in fact, quite a few current
24 eligible KECP participants, who have
25 been a party to these investigations.

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2 I'm not saying they're targets, I'm not
3 saying they've been accused of any
4 wrongdoing. But, they have been
5 involved. But the compensation
6 committee, to our knowledge, based on
7 the record that we've submitted here
8 today, have never looked at what was
9 said, what was known about those folks.
10 Now, building on that, with respect to
11 the prophylactic measures, Your Honor,
12 we submit to the court that the claw-
13 back provisions that are in place, is a
14 good starting point. The standard in
15 place is, did they act -- did an
16 individual act -- fail to act in good
17 faith, and against the best interest of
18 the company. But, what I asked Mr.
19 Webber, and what Mr. Angelovich asked
20 Mr. Opie is, what about moving that
21 standard to the front end, as a standard
22 for escrow. I think that is a very
23 appropriate standard, similar to the
24 standard used by Judge Gonzales, and
25 there's absolutely no reason why this

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2 compensation committee cannot make that
3 evaluation with at least with respect to
4 the 17 people that we named in our
5 objection. The testimony during
6 depositions, and I don't think anyone
7 here would disagree, that if our
8 allegations are true, they are serious
9 allegations. If that's true, is it
10 asking too much of the debtor, given
11 what's going on, to, at least, look at,
12 under that lower standard of the claw-
13 back procedure, look at those employees
14 and see if they have been guilty of
15 violating that standard. And, if so,
16 escrow the money. Now, a lots been said
17 --

18 THE COURT: Well, can I
19 interrupt you there?

20 MR. BECKWORTH: Yes, Your
21 Honor.

22 THE COURT: Wasn't it the
23 testimony that if you employed that
24 standard, because it is a rule or
25 standard, you have to have a due process

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2 hearing? So, then you'd be involved in
3 a lot of litigation over simply putting
4 it into escrow, whereas what's been
5 derived as far as the escrow standard,
6 is an objective standard that's based
7 upon some other factor such as the SEC
8 or an indictment or, or the employee,
9 him or herself, taking objective step,
10 like invoking the fifth amendment, where
11 you don't need that type of due process
12 and you could just say its in the escrow
13 like that, and we're going to postpone
14 this issue until it's decided in the
15 future.

16 MR. BECKWORTH: Your Honor, I
17 think that the question I asked of Mr.
18 Webber with -- exact to that, was that
19 first he said yeah, they may, I'm not
20 sure, but they may be entitled to due
21 process. But the ultimate issue is,
22 this plan, whether it's approved and the
23 scope of what is approved, you know, I'm
24 not a bankruptcy lawyer, but I believe
25 that's up to Your Honor. And, I believe

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2 its up to Your Honor to determine
3 whether, and to what extent, those due
4 process safeguard -- due process
5 safeguards are there. This isn't asking
6 to take money away from somebody that
7 they already have. It's asking, simply,
8 that even if they hit these targets, and
9 they're entitled to that money, that it
10 be held in safekeeping until a later
11 time. I don't think that's too much to
12 ask. And, I, you know, I may be wrong,
13 but I just don't see it. Now, Your
14 Honor, with respect to the prophylactic
15 measures, were just simply asking to
16 change the order. But, we're also being
17 asked by the debtor, and to some extent
18 by the committee, to put an awful lot of
19 trust in these folks, to go after these
20 people. Well, I think there's inherent
21 conflict there. We see the fight that's
22 gone on and, you know, they have every
23 right to fight us with what they've
24 done, but, Your Honor, if there are
25 ongoing federal and civil investigations

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2 and perhaps criminal trials and SEC
3 actions and our action, wouldn't it be
4 somewhat against the debtor's best
5 interest to actually go out and go
6 through these claw-back procedures in
7 the scope of all that's going on? I
8 mean, I think it is. And, so one
9 suggestion we have, is whether there
10 should be some independent party
11 involved, maybe an examiner to act with
12 both the board and the creditors
13 committee. I think there's been a lot
14 made about timely here, Your Honor, and
15 one of the things that I think I would
16 close with is, we think the timing on
17 these prophylactic measures are
18 premature. Not that they shouldn't have
19 ever been done, we wish they had been
20 done back when they proposed this plan,
21 but it's simply something that's, I
22 think, they've rushed with a good
23 motive, but a rush to put together. I
24 don't think they'd go far enough. They
25 haven't even given time for the dust to

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2 settle, not with respect to our
3 proceedings, but these very serious
4 governmental investigations. And all
5 that we're asking is simply to look at
6 the people we've named and ask the
7 compensation committee to look at the
8 audit committee review standard that's
9 out there, determine whether that
10 standard comports with the standard that
11 they have for claw-back procedures, and
12 look at every other thing that's
13 available to them and just make a basic
14 determination of whether wrongdoers are
15 being left at the company. And,
16 finally, there's another problem with
17 all of this. You've talked about the
18 targets and whether they're a lay up and
19 all that, the people, the way we
20 determine based on the testimony,
21 whether those targets have been reached,
22 my understanding is based upon the
23 financial reporting and accounting
24 statements that'll be filed by the
25 debtor. Our allegations show, or at

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2 least suggest, that some of the people
3 that have been charged of that very
4 process, who may have been involved in
5 the wrongdoing that led to the
6 restatement, are still in the same
7 position now to determine whether the
8 statements reach a level that meet those
9 targets. We think that could do further
10 damage to the company. We certainly
11 don't think it's appropriate that
12 someone like that should be rewarded
13 under a program like this. Your Honor,
14 we appreciate your time.

15 THE COURT: Please don't sit
16 down. In Enron hadn't there already
17 been indictments?

18 MR. BECKWORTH: Your Honor,
19 there's two --

20 THE COURT: And, in fact guilty
21 pleas?

22 MR. BECKWORTH: I do not know
23 the answer to that because there are two
24 cases cited two different versions of
25 Enron that were cited. The last one

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2 that I was quoting from was February 6,
3 2003 and I'm pretty sure by that time --

4 THE COURT: So, that's clearly
5 post Arthur Anderson and post the
6 indictments --

7 MR. BECKWORTH: Yes, I think by
8 that time that is true.

9 THE COURT: All right. And
10 then after -- wouldn't it, as a
11 practical matter, if some other court
12 found the trigger, dishonesty as you
13 quoted Enron, wouldn't that be res
14 judicata or collateral estoppel for me.
15 I mean, there it is as a practical
16 matter, why would I have to spell it
17 out? They could be in any court.
18 Because as a practical matter, that
19 would be the case.

20 MR. BECKWORTH: You mean, if
21 they found that these standards had been
22 hit, that you'd have to rely upon that?

23 THE COURT: Yeah.

24 MR. BECKWORTH: Oh, I don't
25 disagree with that at all.

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2 THE COURT: And -- okay.

3 MR. BECKWORTH: But I would
4 have two comments with that. One is,
5 you are talking about a standard that,
6 let's just take for instance, a criminal
7 standard, that may be higher, and in
8 fact, is higher than the current claw-
9 back procedures and is higher than
10 what's in their own code of conduct
11 about what's appropriate so --

12 THE COURT: Well, but I don't -
13 - under -- I mean, how -- what other
14 context would it be? I mean, it's
15 either going to be a criminal finding or
16 a finding of, you know, fraud or some
17 other thing in a civil action. So, what
18 -- I mean, this particular standard goes
19 beyond, generally, what any court would
20 be asked to find.

21 MR. BECKWORTH: Your Honor,
22 there is no provision in the current
23 escrow that deals with the securities
24 litigation.

25 THE COURT: I'm not talking

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2 about the escrow.

3 MR. BECKWORTH: You're just
4 talking about the claw-back provision?

5 THE COURT: Yeah.

6 MR. BECKWORTH: I think the
7 claw-back provision's fine. I don't
8 have a problem with that at all. We're
9 talking about the escrow because it
10 does, you have got to assume that to get
11 to the claw-back provisions these other
12 things have to happen first and we're
13 depending on government bodies with
14 different ideas, and different resources
15 that are available to the debtor,
16 whether they're actually going to even
17 go through with these proceedings. That
18 we don't know.

19 THE COURT: Well, and again, as
20 far as timing is concerned, this
21 wouldn't get awarded on the debtor's
22 program for six months. Your motion,
23 the motions to dismiss in your
24 litigation are to be filed next month
25 and probably will be heard by then,

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2 won't they?

3 MR. BECKWORTH: Your Honor,
4 under the current standard, the motions
5 will be filed March 15th, I don't think
6 we're supposed to reply to those until
7 May 6th, and then the debtor has another
8 60 days or 30 days to respond. I can't
9 imagine that these will be responded to
10 until later.

11 THE COURT: Ah, if only I were
12 a district judge.

13 MR. BECKWORTH: Touche. Thank
14 you, Your Honor.

15 THE COURT: All right. So you
16 may not have any determination by the
17 time the six months run.

18 MR. BECKWORTH: I think it's
19 highly unlikely that we would.

20 THE COURT: Okay.

21 MR. BECKWORTH: Thank you, Your
22 Honor.

23 MS. LEONHARD: Good afternoon,
24 Your Honor, Alicia Leonhard for the
25 United States Trustee. Your Honor, the

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2 United States Trustee recognizes the
3 value of incentive programs for
4 executives and also their propriety and,
5 is not categorically opposed to one for
6 the Delphi employees. However, the U.S.
7 Trustee does join with all the other
8 objectors in stating that the relief is
9 premature to grant the relief. And, I
10 think that the reasons may be perhaps, a
11 bit different from the other people. I
12 have a little broader picture is that
13 the benefits of waiting and revisiting
14 the issue in six months, really outweigh
15 the detriment to the executives. I
16 didn't see any evidence that any of
17 these executives are going to flee in
18 the next six months because they didn't
19 get their incentive, but I t certainly
20 overcomes a huge public relations
21 problem that the debtor has, and a huge
22 public perception problem of unfairness.
23 And, in addition, the parties can, we
24 can see how the debtor's business plan
25 is operating, if the targets are proper

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2 and I believe that there will be no harm
3 to anybody, so --

4 THE COURT: I'm going to ask
5 you the same thing --

6 MS. LEONHARD: Yes.

7 THE COURT: I asked Ms.
8 Ceccotti. But, aren't you always going
9 to have that public perception problem?
10 I mean, if you reached an agreement with
11 the unions and, you know, then as part
12 of the confirmation, you retroactively
13 approved this plan, and other aspects of
14 a plan, aren't people going to say,
15 well, you know, they snuck one by us?

16 MS. LEONHARD: No, I don't
17 believe so, Your Honor. I think, you
18 know, because I believe that if, you
19 know, once you -- if you're emerging
20 from bankruptcy with a plan, with an
21 exit strategy, theoretically in good
22 financial condition, and ready to move
23 forward lean and mean, I don't think
24 anybody's going to object to proper
25 compensation for the executives. And,

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2 so I think, you know, I understand your
3 comment, but I believe that it will not
4 be taken that way. So with that, the US
5 Trustee would request that Court defer
6 this matter and --

7 THE COURT: Okay.

8 MS. LEONHARD: -- for six months
9 or so. Thank you.

10 THE COURT: All right.

11 MR. BUTLER: Your Honor, first
12 I want to just correct something that
13 may be in the record in Mr. Kennedy's
14 remarks. He was talking about Mr.
15 Budgnovich's declaration at paragraph
16 32. I believe it was Mr. Kennedy, that
17 raised the issue about having positive
18 Ebeda performance for the six month
19 period, but a negative ebadar ag and he
20 sort of said that meant that already
21 we're saying that our performances are
22 going to be better than the plan.
23 That's not what paragraph 32 says. What
24 paragraph 32 says, is that at the
25 corporate level the target EBITDAR ug

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2 with the u and the g taken out, is
3 derived from the debtor's business plan,
4 as approved by the board of directors
5 and it's a negative 80 million. Then it
6 goes on to say, that the company expects
7 that its EBITDAR without the ug taken
8 out, will be positive for the six month
9 period. They're two different measures
10 and the business plan, as it turns out,
11 has positive EBITDAR in the six month
12 plan, but when you remove, as we agreed
13 to do in our negotiations with the
14 creditor's committee, the effect of
15 anything in the plan, related to General
16 Motors or union activity, it caused it
17 to be a negative 80 million, that it was
18 a number that was derived. So, I don't
19 want the court to have the impression
20 that the way this was constructed that
21 we set the number at negative 80 million
22 but the plan already had a bunch of
23 money in it that suggests that the
24 company is going to perform. That's not
25 the case at all. Addressing first the

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2 lead plaintiff's comments on
3 prophylactic provisions, I was active in
4 the Enron case. I was special counsel
5 to the debtor's. We were involved with
6 all the congressional investigations. I
7 was very aware of what Judge Gonzales
8 ruled and didn't rule on those matters.
9 Enron was in a very different place at
10 the time these programs were considered.
11 And, while it is true, on the one hand,
12 that not every provision that was in the
13 final arrangements with Judge Gonzales
14 in that order, I remiss. It's also true
15 that most of the prophylactic provisions
16 that are in this order, that we've
17 negotiated on, or proposed order that
18 we've negotiated on and agreed to with
19 the creditor's committee, were not in
20 that program. And, I think -- and the
21 other piece of it that I think reflects
22 something that may not, just to be
23 clear, there was a suggestion somehow in
24 argument that the claw-back mechanism is
25 only available if there wasn't an

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2 escrow. That, you know, escrow -- the
3 escrow had to trigger something in order
4 for there to be a claw-back or
5 forfeiture, and that's not the case.
6 There are two independent measures. One
7 is, what are the facts objectively, Your
8 Honor, identified those that would have
9 had to occur objectively that would
10 cause somebody to go into escrow? And
11 it may not matter to anybody else, it
12 would certainly matter to the executive
13 whose pay is being deposited an account
14 and they're not getting it. What are
15 the objective standards to do that early
16 on? And, by the way, it's not just that
17 the third party standards, its if the
18 committee decides there's a claim or the
19 debtor's decide there's a claim. And,
20 there's a check and balance there, and
21 we're involved as co-fiduciaries, in
22 looking at various matters. That's what
23 creates the escrow. What would cause a
24 forfeiture of that escrow, or a claw-
25 back of anything paid that was not

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2 escrowed, are the procedures that even
3 the lead plaintiffs have conceded seem
4 to reasonable to them. And, Your Honor,
5 we -- and even on that there's a check
6 and balance because, in addition to the
7 due process given to the employee
8 involved, the creditors committee gets
9 to review the record. If they think,
10 somehow, we have not done our job and
11 made the appropriate determination, we
12 agreed that we would come to you for a
13 ennobled review, not just your overseeing
14 what we did, but you'd have to have a
15 chance to take a fresh look at that
16 record. We hope to never get to your,
17 Your Honor, because we think the co-
18 fiduciaries can address these issues on
19 our own, but we wanted to have a very
20 transparent check and balance in the
21 system.

22 THE COURT: Is there a problem
23 with providing, what I think Mr. Opie
24 said, would actually happen in practice,
25 that if the audit committee, which of

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2 course he serves on as well as the
3 compensation committee, determined that
4 the employee, in its view, fit within
5 the claw-back definition, that it would
6 -- it would so inform the compensation
7 committee?

8 MR. BUTLER: Your Honor, I had
9 -- we certainly can add that to the
10 order. The reality is, the order
11 already says, if the debtor and that's
12 everybody --

13 THE COURT: I know, but there's
14 a perception, I think, that the one
15 doesn't talk to the other, even though,
16 of course, Mr. Opie's on both of them.

17 MR. BUTER: We can certainly
18 fix that perception, Your Honor.

19 THE COURT: Okay.

20 MR. BUTLER: The other piece
21 and I'll try to be relatively brief
22 here, except I do want to just respond
23 to the objections that were made.
24 First, there are a lot of processes that
25 were going on here, and labor

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2 transformation, the 1113 process is one
3 of the most important things that are
4 involved in the case. But, its one of
5 three or four primary objectives that we
6 put in place here. And, as we're
7 thinking about this program --

8 THE COURT: I'm sorry, I want
9 to interrupt you because I want to make
10 sure -- and you're not a criminal
11 lawyer. By agreeing to that, does that
12 create any issues in complying with SEC
13 investigations and the like? I would
14 think it would not, but, I just would
15 want to make sure that it does not,
16 somehow blow the lid on -

17 MR. BUTLER: I don't think --

18 THE COURT: -- confidentiality
19 issues that the government may have
20 imposed on the audit committee or vice
21 versa.

22 MR. BUTLER: I'll check with
23 the audit committee, and the audit
24 committee is not going to be releasing
25 information from the government. I

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2 mean, that's a different -- and we won't
3 breech that wall, Your Honor.

4 THE COURT: All right. I'm
5 sorry. I'm sorry to interrupt you.

6 MR. BUTLER: No, I was -- with
7 respect to the issue of the labor
8 transformation matters here, that is one
9 of the three or four primary objectives
10 of this case, which is to address and
11 resolve those issues, hopefully, like
12 all of us want to do on, if we can, a
13 consensual basis. But in considering
14 this program, and considering whether
15 Your Honor, will ratify -- essentially,
16 ratify our business judgment, the
17 debtor's business judgment, in wanting
18 to restore a piece of that pie, that was
19 taken away, the question is, in doing
20 that and trying to deal with the 1113 is
21 to understand that these are on -- in
22 some respects, separate tracks, and also
23 to understand that the labor
24 transformation effects, and it's
25 important 46,000 people in this country

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2 that are in the domestic spheres, and
3 oh, by the way, its not just the 34,000
4 folks who are represented and by the
5 unions. There is going to be
6 transformation of the salaried workforce
7 in the domestic, in the United States,
8 as well. As we implement SGNA
9 reductions and those folks -- some of
10 those folks go away. This is not just -
11 - the burden is not just on labor. But,
12 I want to simply point out, without
13 making any predictions, and without
14 anything -- saying one thing or another
15 -- the discussions between, that have
16 been publicly reported between the
17 company and its unions and General
18 Motors are active and vibrant and I'm
19 not going to characterize them. But, I
20 also point out on the record here,
21 particularly with the media that are in
22 the room here today, that the scheduling
23 order that is docketed in this case,
24 that sets a February 17th filing
25 deadline, contains within it in the last

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2 paragraph of that order, a statement
3 that if the debtor determines its
4 necessary, or appropriate to adjourn the
5 February 17th date, that that occurs by
6 notifying Your Honor's chambers and by
7 notifying the international unions and
8 the creditors committee. And the
9 reality is, there are board of
10 director's meetings scheduled next week
11 in Troy, Michigan. There's a creditors
12 committee meeting scheduled next
13 Thursday, here in New York, at which
14 these matters are going to be discussed
15 at great length. And the debtor's will
16 do what is the appropriate thing, as a
17 fiduciary, on next Friday. They will
18 either file something, or they will seek
19 another date, if that's what makes sense
20 in this case. All right. And that --
21 while everyone wants to tie these issues
22 directly together, and we'll have
23 debated with Mr. Rosenberg about why
24 these cases are closer in proximity, the
25 fact of the matter is, Your Honor's

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2 already observed it. There is no good
3 time in a Chapter 11 case of this type
4 to talk about executive compensation.
5 And, oh by the way, had anyone thinks
6 that it's okay once you have a deal, the
7 court only has to take some judicial
8 notice of what went on in United
9 Airlines, recently, after they had all
10 the deals, and the executive
11 compensation program was put at the end
12 and the consternation it caused among
13 all the unions, among the creditors
14 committee and all the litigation that
15 went on after all the other deals had
16 been given, there was never a good time
17 to deal with this. But we made a
18 business judgment as a company, after
19 consulting with the creditors committee,
20 trying to figure out what made sense,
21 what's in the best interest of the
22 estate, we decided to put the bulk of
23 these issues, mostly around the long-
24 term incentive programs, and the
25 emergent things, off to another day.

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2 Like everyone wants, let's put it off --
3 let's put it off six months. What we
4 concluded, and the record is clear on
5 this, Mr. Opie is the lead director of
6 this company, came and testified to it
7 in his deposition, in his declarations
8 and on the stand, attest to the fact
9 that the board, the compensation
10 committee, all examined and thought about
11 all these factors and issues. And, on
12 balance concluded that it was in the
13 best interest of the estate, as the
14 debtors, to go forward with this program
15 of a limited restoration of part of the
16 pie that does not now, exist. The -- in
17 reaching that --

18 THE COURT: I'm sorry, I
19 didn't, you know, it's been a few hours,
20 but, where in his deposition does he
21 talk about the effect of this on the
22 negotiations with the union?

23 MR. BUTLER: One moment, Your
24 Honor, I'll get you the --

25 THE COURT: I'm sorry. His

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2 affidavit, not his deposition.

3 MR. BUTLER: Your Honor, its
4 discussed in his testimony on paragraph
5 28 of the declaration on page 15. And,
6 they're also exhibit -- you also have an
7 exhibit 11, Your Honor, at exhibit 11,
8 you have the board minutes for the
9 February 1st meeting at which there is
10 also further reference to it. Where it
11 said in the board minutes, on page 2 of
12 the board minutes, there's a whole
13 discussion regarding the -- that Mr.
14 Miller had led, regarding the
15 discussions with the UCC regarding the
16 proposed six month plan. I discussed
17 the terms of the plan. He discussed --
18 indicated that the rest of the program
19 was putting off to a later date. He
20 reviewed with the directors, the issues
21 raised with the UCC and management. He
22 noted about the declaration need be
23 filed at February 10th. He talked about
24 trying to resolve the issues with the
25 UCC, talked about what the alternatives

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2 were, talked about deferring all actions
3 regarding the incentive plan until the
4 corporation finished its discussion with
5 its labor unions. There were much --
6 "there was much discussion on the pros
7 and cons of each approach and on the
8 inner relationship between this decision
9 and the status of the ongoing decisions
10 with the labor unions in General Motors.
11 Mr. Opie suggested that the directors
12 revisit this topic in executive session
13 after management finished its update," I
14 was the only person to attend that
15 executive session, other than the
16 directors, and you can see the notation
17 at the bottom of exhibit 11, about the
18 report I made back to the corporate
19 secretary regarding those discussions in
20 which there was unanimous consensus of
21 the independent directors, after they
22 completed further deliberation. That it
23 was in the best interest of the debtors
24 to go forward with this program on this
25 limited basis that we've discussed. So,

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2 Your Honor, what we have here, is a
3 difference of opinion, not -- it's not
4 on the evidentiary record. I mean, the
5 evidentiary record, I think, is
6 overwhelming as to the -- and frankly
7 not controverted -- as to the form of
8 the program, the substance of the
9 program, the targets, and oh, by the
10 way, as the record, the evidentiary
11 record indicates, the targets were all
12 negotiated with Mr. Rosenberg, with the
13 creditors committee and with Pearl
14 Meyer, their compensation consultant.
15 All the curves that are in the exhibits,
16 all the targets, how it all works, the
17 ranges, the amounts, whether the 80
18 million was reasonable, the obadar ug
19 targets, those were all reviewed and
20 approved by the comp committee, excuse
21 me, by the Miss Pearl Meyer, the
22 creditors committee's compensation
23 consultant, and ultimately form the
24 basis of the agreement between the
25 committee and the company on that

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2 subject. So, there is nothing in this
3 record, and there was no evidence to the
4 contrary, put in this record, to suggest
5 anything about that is -- that there's
6 improper, inappropriate, unreasonable,
7 frankly, anything about the form, the
8 substance of this program. Nor, has
9 there been any evidence in the record to
10 dispute the debtor's position, which is
11 the fact that these programs, the
12 opportunities were available on a pre-
13 petitioned basis. One of the union
14 respondents made a point of saying, well
15 its not the opportunities, it didn't pay
16 out some years. It may not pay out this
17 year. But there was, in fact, an annual
18 incentive plan adopted by the board of
19 directors through its comp committee in
20 each of the years it set standards.
21 Sometimes it paid out, sometimes it
22 didn't. All right. This program, after
23 its been bedded with the creditors
24 committee has been adopted for the first
25 six months of this year, and as the

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2 evidence indicates in the declarations,
3 the agreement was to do it for only six
4 months, because everyone recognizes this
5 is such a dynamic case, that we are
6 better off to go for just these six
7 months and then come back and
8 recalibrate and see what makes sense
9 going forward in the cases. But, on
10 balance, what we have here is, on the
11 one hand, the evidentiary record, and on
12 the other hand, a difference of opinion
13 and an effort to substitute the business
14 judgment and opinion of everyone else,
15 other than the debtors. Even though
16 there's no evidence in opposite to the
17 targets and the structure of the
18 program. The other thing, just a couple
19 of other comments, I was thinking about
20 this, and I recognize, I have dealt with
21 most of the lawyers on this side of the
22 room for many, many years, and many,
23 many cases involving labor
24 transformation. All right. And, I
25 recognize how difficult these cases are

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2 and how much work we all have to do. I
3 also recognize, Your Honor, that we all
4 have a common responsibility to try to
5 make sure our clients deal with the
6 facts and address the facts that are the
7 facts. And, I hope, in this record
8 today, because the record is so
9 uncontroverted, and it is so clear what
10 this is, and what it is not, that the
11 leadership of the union can explain the
12 facts in the evidentiary record that
13 they can -- they can do things, and how
14 they describe this, that caused this not
15 to be the irritant, stumbling block, and
16 lighting of fire. There's no question
17 in my mind, that if the leadership of
18 these unions wants to try to light a
19 fire, they can light a fire. But,
20 that's a conscious decision they make as
21 a part labor strategy. They can also
22 take the position in reporting on their
23 web sites to the their members, if Your
24 Honor, approves this program based on
25 the record, and under O'Rian affirms out

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2 business judgment, then they also can
3 report that this was carefully debated.
4 It was carved back by the creditors
5 committee who has oversight. There was
6 no objection to the actual program
7 itself and very limited relief was given
8 today and the rest was put off until
9 later in the year. It's all a matter of
10 how people want to do things, and to
11 suggest that we should prejudice the
12 debtor's reorganization and our -- the
13 way in which we are addressing the
14 shortfall here, which is uncontroverted
15 in the record, based on somebody
16 lighting a fire, I would just point out
17 that the union leadership themselves,
18 have some shared responsibility in that
19 fact. I also think it's important, Your
20 Honor, to reduce the abstract to the
21 reality, and I agree with Mr. Scotty,
22 that its important to be pragmatic here.
23 Who are these 466 executives? And what
24 are they responsible for doing? Well,
25 we know, and the evidence is

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2 uncontroverted, that they're not just
3 managing a workforce of 46,000, but a
4 workforce of 185,000. They're not just
5 managing what's going on in the United
6 States, but they are managing work on
7 six continents. And, as they go through
8 and do that work, they're doing it in
9 key areas to make the company
10 reorganizable. Just take two, for
11 example, and then I will stop on this
12 point, GSM the supply chain, managing
13 the continuity of this supply chain, as
14 we've said, and Your Honor's recognized
15 in other matters, is key to our
16 survival. And, I recognize that if the
17 labor -- if labor chooses to interrupt
18 the supply chain -- that would be a
19 problem for us. There's also a contract
20 that prevents that, at the moment. And,
21 we would expect that if people aren't
22 trying to make this something it isn't
23 that this won't happen. But the supply
24 chain, the amount of work and effort
25 across six continents, it has to go on

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2 by the global source management group,
3 by the GSM group, in order to be able to
4 supply-- rather management group, to be
5 able to make that supply chain
6 uninterrupted. All right, that is an
7 extraordinary effort. And it is
8 creating real value and it has nothing
9 to do with labor transformation. It has
10 to do with another huge important aspect
11 of this case. There's another whole
12 organization that manages the customer
13 business in this thing. We are -- we
14 are in the middle of the supply chain
15 ourselves. We have suppliers, that's
16 one half, we have to deliver the OEM's
17 to customers all over the world.
18 Managing those customers, helping those
19 customers understand, not General
20 Motors, but everybody else were doing --
21 working with. Having them understand
22 why they should give us awards in 2009
23 and '10, and '11 and '12 and having
24 those customers happy and working those
25 relationships, and that takes senior

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2 talent. That takes a tremendous amount
3 of energy and effort. That is something
4 that has to go on too. Without the
5 supply chain, without customers, we
6 don't have a reorganizable business
7 either. And, every day when they wake
8 up, these executives have to go and deal
9 with those issues too. And, you know,
10 all we've tried to do here is put in
11 what the -- is uncontrovertable
12 testimony that this is an ordinary plus
13 program, involved in, refer to legal
14 standard now, I'm just talking about
15 ordinary course and sense, all the other
16 companies have it, all right. And, this
17 is a program that is in chime, not to
18 guarantee bonuses, not to stay for pay,
19 but, in fact, to incentivize. And, the
20 last comment on the union issue, Your
21 Honor, in response here, there was a
22 comment here that Your Honor defers this
23 because the unions must be fully
24 engaged. And, implicit that suggestion
25 was, that, you know, we won't be fully

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2 engaged. We won't allow ourselves to be
3 fully engaged. We won't exercise
4 leadership to be fully engaged if the
5 court determines on this uncontroverted
6 record, that this program is reasonable.
7 And, that's -- that -- we need to have
8 more leadership in the unions too. We
9 all need to --

10 THE COURT: Well, I don't know
11 if it was in that context. I think, if
12 I recall in the reference, it was to the
13 fact that the union hasn't really vetted
14 the target.

15 MR. BUTLER: Now, that was USW.
16 This was the comments from the UAW, Your
17 Honor. United Steel Workers said they
18 hadn't vetted the target. That was in
19 their comment. I think -- I think, Ms.
20 Ceccatti actually said the target wasn't
21 the important issue here, they want
22 focus on the targets.

23 THE COURT: Well, but according
24 to the UAW, I admit, but what about Mr.
25 Grandstaff's point, which is that there

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2 is a tremendous amount of understandable
3 uncertainty on the union members' part,
4 as to what's going to happen with their
5 jobs, including the potential that it
6 all unravels. In light of that
7 uncertainty, where is the harm, given
8 the importance of resolving that issue,
9 and the undoubted flack you're going to
10 get if I grant this motion, where is the
11 harm in my, for example, finding that
12 this program is reasonable and fair and
13 necessary to make the debtor
14 competitive, but that its actual
15 implementation should be deferred until
16 a reasonable time to conclude the
17 negotiations has transpired? Which
18 would probably be well within the six
19 months.

20 MR. BUTLER: Your Honor, I'm
21 not sure, in the last part, that's
22 correct. That we'll have a plan and
23 we'll be --

24 THE COURT: I'm not talking
25 about a plan. I'm saying a reasonable

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2 time for the parties to have made --
3 given it their best shot.

4 MR. BUTLER: Yeah, well, Your
5 Honor there's two points in that, I
6 think. One is what you're really doing
7 is going back and telling the executives
8 that there's -- that it's, you know.
9 The court actually finds, based on all
10 the evidence and all this discovery and
11 all the testimony that this is
12 reasonable, it's appropriate, it's
13 necessary but the court's not going to
14 give it to you. Even though that's a
15 reasonable -- and that

16 THE COURT: I'm not going to
17 give it to you now.

18 MR. BUTLER: But what's -- how
19 does an executive have any belief -- you
20 know, look the executives get it. They
21 understand that executive compensation
22 in bankruptcy cases is a -- you know, is
23 a socially unacceptable kind of issue,
24 and that everybody is going to be
25 unhappy about it except the executives,

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2 all right. And, so to say, you've
3 actually won the case, debtor, nobody
4 challenged the case or the challenges,
5 you've overcome them by, you know, a
6 preponderance of the evidence, all
7 right, but you can't implement it under
8 (indiscernible). You can't implement
9 it right now, how does an employee think
10 they're ever going to get it. I mean,
11 you're basically saying to the
12 employees, and to me that's almost the
13 worst of all possible worlds. You're
14 telling the executives that this program
15 is a reasonable program, that what we've
16 been saying to them --

17 THE COURT: Except for one
18 fact, which is that the aspect of this
19 restructuring, that from day one, in
20 fact the first ten paragraphs of the
21 motion also highlights this, is your
22 dealing with the labor costs.

23 MR. BUTLER: Right.

24 THE COURT: And so, that aspect
25 of it, including enabling those labor

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2 costs to be dealt with in a way that is
3 fair and efficient, means that this has
4 to be deferred.

5 MR. BUTLER: Your Honor, what
6 that says, that sounds great on one
7 sense, but what it really says is, we're
8 going to hold the restoration of these
9 benefits hostage to somebody else
10 getting what they want.

11 THE COURT: Not necessarily.

12 MR. BUTLER: Well --

13 THE COURT: It just says that
14 you have a fair chance of going through
15 it.

16 MR. BUTLER: Well, Your Honor,
17 when you take a step back, this is, as
18 you (indiscernible) an Orien pictures
19 summary proceeding to evaluate our
20 business judgment. And, there's
21 evidence on this in the record.

22 THE COURT: Well, I know, but
23 you're saying to me, ignore the business
24 judgment about doing it now.

25 MR. BUTLER: No, I'm not saying

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2 ignore the business judgment. They are.

3 THE COURT: Well, I understand.

4 MR. BUTLER: I'm saying --

5 THE COURT: But, I'm saying
6 that they have some real force to their
7 argument.

8 MR. BUTLER: I'm saying, Your
9 Honor, that we didn't suggest that these
10 calls aren't difficult situations. We
11 didn't suggest that we haven't listened
12 to what the unions have said, quite to
13 the contrary. What the board of
14 directors minutes say that are in
15 evidence, what the declarations say that
16 are in evidence, by which none of the
17 objectors challenged our evidence on
18 this point. What it said was, that our
19 board of directors took all these
20 considerations in, pro and con, these
21 are the independent directors that have
22 no stake, no financial stake in this
23 program, took all these considerations
24 in, pro and con, they took them into
25 account, they balanced them. They

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2 weighed them in terms of trying to make
3 sure that we could do all the things we
4 need to do for the global business, and
5 they came to a conclusion that on
6 balance, we should seek approval of this
7 limited program and put everything else
8 off. That is the business judgment.
9 Nobody's suggesting that there isn't a
10 reasonable position in the unions. Most
11 of the discussions we have between the
12 company and the union, there's a
13 scintilla of reasonableness and truth in
14 what everybody says. And I say a
15 scintilla, because different of us are
16 going to say I got more reasonable this,
17 or you got more reasonable, you know,
18 there's all these positions have within
19 them some reason, but at the end of the
20 day, on this record, in this proceeding,
21 the question is whether the debtors have
22 exercised reasonable business judgment
23 in weighing all these things. We didn't
24 miss them. We didn't ignore it. We
25 evaluated it, and at the end of the day,

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2 concluded that this problem of having
3 our 466 executives have half of what
4 they have had historically, this problem
5 is unacceptable. We've lived it for the
6 first four months of the case, we don't
7 believe we can live it through the next
8 six months of the case without having
9 purchased the estate. Beyond that, you
10 want to talk about fair and equitable,
11 the only people who've taken cuts so
12 far, have been the senior executives.

13 THE COURT: And again, you say,
14 "so far", but it's patently obvious that
15 you're going to ask people to take cuts
16 of, you know, 50 percent.

17 MR. BUTLER: Right. And the
18 way this has been structured with the
19 creditors committee --

20 THE COURT: Or more, you know,
21 you've actually asked for more. So --

22 MR. BUTLER: And, Your Honor,
23 its also the way this has been
24 structured, the creditors committee and
25 the next six month program they'll be

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2 back before the court on too. Right?
3 Everyone, normally in these cases you
4 get decent programs put in place, and
5 you're able to go through the case with
6 them. We're back here this summer to
7 deal with this program again. The
8 question is, whether or not, after
9 having not been able to implement this
10 program in the fourth quarter of 2005,
11 whether or not, now that we've reached
12 agreement on the substance and form of
13 the program, with the creditors
14 committee and there are no, there's
15 nothing in the evidence that controverts
16 the appropriateness of this program,
17 whether or not we're able to deliver an
18 incentive opportunity to our executives
19 or not.

20 THE COURT: Except, how are you
21 going to look them in the eye, next week
22 and say I have a chance to get a \$500,00
23 bonus, and by the way, I'm asking you
24 for a 50 percent reduction in pay?

25 MR. BUTLER: Your Honor,

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2 ultimately in all these things, we look
3 at the entire compensation structure
4 each people have, and you work through
5 those issues. The real -- I mean,
6 that's the reality. I mean, otherwise
7 you basically saying to the court --
8 saying to people that in a case where
9 there's going to be --

10 THE COURT: It hasn't really
11 been -- I guess that the point I'm
12 trying to make, is that you've worked
13 through half of the issue, and I think
14 you've worked through it reasonably.
15 And, I'm prepared to find that. I think
16 you have worked through it reasonably.
17 But, I'm not so sure, and there's --
18 except for the banks, and, of course,
19 you know, I don't really encourage
20 people to stand up and say "we support
21 this", because I think that's a
22 redundancy and you did a good enough job
23 as it is, but no one else is supporting
24 this motion in this case. I mean, the
25 secured banks withdrew their objection,

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2 but everyone seems to think that the
3 mere fact of the other half of the
4 equation, which is the big half, which
5 is dealing with the union costs is yet
6 to come. And, they have -- they have a
7 point. It's very -- as you said, it's
8 very difficult to ask people to make
9 those types of concessions, literally
10 when this has happened. Now, at the
11 same time, I think, based on this
12 record, the executives are entitled to
13 it. Which is why I'm prepared to make a
14 finding. But, it's just -- it sets up -
15 - it sets up a very odd dynamic.

16 MR. BUTLER: Your Honor, its
17 hard, one of the more difficult jobs in
18 this room, to a certain extent, other
19 than Your Honor's today, is mine.
20 Because when you stand up here, I'm
21 advocating what I think the law and the
22 facts and the court --

23 THE COURT: I understand.

24 MR. BUTLER: It's a clearly
25 unpopular position, but it doesn't mean

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2 that this company, in order to fulfill
3 it's fiduciary responsibilities,
4 shouldn't address this issue. That's
5 the only point, Your Honor.

6 THE COURT: No, I agree with
7 that. It's really a timing point.

8 MR. BUTLER: Right. And,
9 ultimately, ultimately through a process
10 that's been well documented and there's
11 clear evidence and uncontroverted
12 evidence in the record about what that
13 process has been, the question is
14 whether Your Honor's prepared under
15 Orion Pictures, to overrule that
16 business judgment.

17 THE COURT: Okay.

18 MR. BUTLER: Thank you, Your
19 Honor.

20 THE COURT: All right, well I
21 better go think about that for a few
22 minutes.

23 (Recess)

24 THE COURT: I have, in front of
25 me the debtors' amended motion for

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2 approval of what's referred to as an
3 annual incentive plan, although, as it's
4 clear from the motion itself, it's
5 really a semi-annual incentive plan. It
6 would be in effect for the period
7 January 1 of this year, through June
8 30th of this year. And then, although
9 it is fair to say that there may be some
10 small "p" precedential value at that
11 point, to this plan, it would be re-
12 opened for negotiation and further
13 development in the light of the debtors'
14 case and projections and business plan
15 at that time. The motion as originally
16 filed had an annual incentive plan as an
17 element of a much more involved and
18 expensive, potentially, executive
19 compensation arrangement. The other
20 portions of that motion are being
21 adjourned, or have been adjourned
22 periodically, and they are now scheduled
23 to be heard sometime in July of this
24 year. And, as Mr. Rosenberg pointed out
25 at the beginning of the hearing, my

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2 ruling this evening pertains just to the
3 "annual" incentive plan that is before
4 me at this time, and just in reference
5 to the facts as developed in this
6 hearing, which is appropriate, because
7 as the parties point out in their
8 papers, which very clearly lay out the
9 standard for the court's consideration
10 of a plan like this, I should review
11 this plan, the "annual" incentive plan
12 in the light of the particular facts and
13 circumstances that pertain today with
14 respect to the debtors' case, and of
15 course, as they relate to its executives
16 and other constituents. That is to say,
17 I believe that this motion should be
18 decided under section 363(b) of the
19 Bankruptcy Code, which applies to
20 actions out of the ordinary course
21 rather than under, or accepting, that it
22 is in the ordinary course, as the
23 debtors have urged. I believe that in
24 light of, first, the potential size of
25 the bonuses that would be awardable

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2 under this plan, which targets bonuses
3 in the aggregate of roughly 20 million
4 dollars, and can go up to roughly 38
5 million dollars, if the debtors
6 substantially exceed the target
7 performance, as well as in the light of
8 the effect that the implementation of
9 this bonus program may have on the
10 debtors' chapter 11 case, generally,
11 and, in more particular, on the
12 negotiations that the debtors are in the
13 midst of with their unions, I think that
14 this is more than a simple human
15 resources matter. That is not to say,
16 however, that this is a particularly
17 extraordinary matter. It is -- it has
18 been an element of executive
19 compensation generally in the
20 marketplace and, in particular, until
21 the period immediately preceding the
22 debtors' chapter 11 filing, an element
23 of the executive compensation for these
24 particular executives. Before the
25 filing, in light of the fact that the

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2 debtors' circumstances had clearly
3 changed, it was recognized by the board,
4 and the compensation committee of the
5 board, that the debtors' compensation
6 scheme for executives had gotten out of
7 kilter. The pre-bankruptcy bonus
8 program didn't particularly work, nor
9 did the non-cash portion of the
10 executive compensation program, and,
11 therefore, they had eliminated those
12 portions prior to the filing. At the
13 same time, they sought to implement
14 revisions, basically, at the very start
15 of the case. The standard then, that I
16 should employ is an examination, first,
17 as to whether this program is in any way
18 tainted by self-dealing or is, instead,
19 the product of the advice of independent
20 advisors and the ultimate decision-
21 making by an independent board. And
22 then, secondly, whether it has been
23 appropriately vetted with the other
24 constituents in the case, so that they
25 can test, also, whether it's tainted by

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2 any form of insider self- dealing.
3 Secondly, if I find that it is proposed
4 on a fair and arm's length
5 basis, and informed by independent
6 judgment, I need to review it in the
7 light of whether it makes good business
8 sense. In that regard, although I'm the
9 ultimate arbiter of that decision, the
10 courts have been clear that I can, in
11 large measure, rely upon the business
12 judgment of the debtor's board itself,
13 particularly if, after adequate notice
14 and opportunity to test the
15 underpinnings of the proposal, there has
16 not been sufficient evidence to indicate
17 that that business judgment is
18 questionable. The official creditors'
19 committee, which, Mr. Rosenberg points
20 out, is properly representative of the
21 various constituencies in this very
22 large case, spent a great deal of time
23 reviewing the originally proposed annual
24 incentive plan and negotiating its
25 terms, and it has done so not only with

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2 the expertise of its counsel and its
3 members, but also its own human
4 resources/executive compensation
5 consultant, and it has concluded that it
6 agrees with the debtors that, as far as
7 the level of compensation and the
8 targets and the measures for awarding an
9 annual incentive for this period, that
10 is the six month period, the plan is
11 reasonable and satisfies its own
12 business judgment. The evidence, and
13 because of the various adjournments of
14 this matter, there's been quite a long
15 time to develop that evidence, also
16 supports that conclusion. There was no
17 meaningful evidence to contradict, for
18 example, that the current arrangement,
19 which for the post-petition period does
20 not have any annual incentive element
21 for compensation, is not competitive and
22 that it, in fact, puts the debtor in the
23 bottom quarter in respect of executive
24 compensation with regard to its
25 competitors. Nor was there any

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2 meaningful evidence to contradict the
3 debtors' record that with this annual
4 incentive plan, at least for the first
5 six months of this year, the executives,
6 when compared against all of the
7 components of compensation available to
8 their counterparts at the debtors'
9 competitors, are essentially in the
10 middle, in the 50th percentile. In
11 addition, there was no meaningful
12 evidence to contradict the evidence
13 offered by the debtors that the targets,
14 the incentive targets proposed, were
15 anything other than the normal types of
16 incentive targets that competitors would
17 have. That is, that they are not a lay-
18 up or a slam-dunk or whatever other
19 basketball metaphor you want to use,
20 but, instead, reflect an opportunity and
21 not a sure thing. And an opportunity
22 that the executives would have to
23 perform at a high level to achieve.
24 This is the case notwithstanding the
25 fact that the target for the overall

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2 corporate level, which constitutes a
3 significant part of the measuring stick,
4 is a negative EBITDAR figure. However,
5 as I think I noted during oral argument,
6 in a chapter 11 case it may well be that
7 a negative EBITDAR figure is,
8 nevertheless, a very desirable target,
9 given where the debtors' business
10 started. I know, further, and I'm
11 persuaded of this having looked again at
12 the affidavit that that target has not
13 been met already but that it is
14 something that is, at this point, still
15 an aspiration. The debtors, in reaction
16 to the creditors' committee's points, as
17 well as other objections, have modified
18 the annual incentive plan in other ways,
19 too. For example, they have backed out
20 of the calculation on both sides of the
21 ledger the effects of saving from, or
22 restructuring costs related to the
23 ongoing negotiations with, the unions
24 and with GM. They have also, more
25 particularized a substantial portion of

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2 the incentive formula tied to the
3 particular divisions that the executives
4 work in. And, further, they have
5 specified the additional review role to
6 be played with respect to each
7 individual executive by his or her
8 superiors and the HR group. Very
9 importantly, they also have implemented,
10 in the light of the accounting
11 disclosures and other
12 events highlighted in the lead
13 plaintiff's complaint, after discussions
14 with the creditors committee, various
15 measures to protect the estates from
16 paying out bonuses, which would not be
17 paid out for another six months,
18 roughly, in any event to, for want of a
19 better word, those who would be either
20 found to be or under certain
21 circumstances that contain a fairly high
22 level of proof in the allegation,
23 alleged to be, "bad actors" in various
24 ways. And those are laid out in exhibit
25 5 in the record. So, looked at on its

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2 own, objectively, it is clear to me that
3 this plan would pass muster as an
4 appropriate form of compensation, that
5 passes the business judgment test
6 ultimately that I would impose upon it.
7 Are there aspects of it that one might
8 change? Yes, perhaps, but that's not
9 what the business judgment test is all
10 about. That's particularly the case in
11 areas involving human resources where it
12 really is not the court's role to micro-
13 manage compensation, planning and
14 decision making. All of the objections,
15 frankly, except for the lead plaintiffs'
16 did not, when you probed, go to the bona
17 fides of the program itself. As far as
18 the lead plaintiffs are concerned, they
19 would like to see different, to some
20 extent, protective provisions in the
21 plan. And in one respect I've agreed
22 with them and the debtors have agreed to
23 implement that change, which is that the
24 audit committee, will in fact
25 communicate, subject to any

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2 confidentiality restrictions that they
3 have because of DOJ or SEC
4 investigations, with the compensation
5 committee, regarding whether the audit
6 committee reasonably believes that
7 either the -- I'm sorry, that the so-
8 called claw-back conditions have been
9 met in respect of a particular
10 executive. But the bulk of the
11 objections, all go to one point, which
12 is that it is contended that even if
13 this program is on its own merits
14 reasonable and within the debtors'
15 business judgment, it is not within the
16 debtors' business judgment to seek it at
17 this time, because the debtor, at this
18 time, is in the midst of seeking very
19 substantial wage and benefit concessions
20 from its union and non-union employees.
21 The objectors say that, because of this
22 juxtaposition, there are two problems
23 with the annual incentive plan that's
24 proposed today. The first is that it
25 will inevitably elicit a hostile

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2 reaction which will, at least, or at a
3 minimum serve as a serious distraction
4 in negotiations. Secondly, they contend
5 that, even though on its own the plan
6 may satisfy the debtors' business
7 judgment, and I recognize that no one
8 has conceded that except the creditors'
9 committee and perhaps the US Trustee,
10 but that's what I've found, the plan
11 isn't fair until there is more clarity
12 in respect of what, ultimately, will be
13 either agreed to or imposed upon the
14 union workers, as well as the non-union
15 workers. There is a clear visceral
16 appeal to that argument. It is very
17 hard to ask someone to make a
18 substantial give-up, when you yourself
19 have just received the right to obtain a
20 bonus. And it, at a minimum, takes at
21 least in practical terms, I would think,
22 at least 10 minutes of explaining in any
23 meeting where that issue's raised, if
24 someone's willing to listen, why the
25 fate of one, the bonus, should not

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2 really be tied to the other, and, in fact,
3 that the request for the concession is
4 thematically, actually related to the
5 other, in the sense, that they're both
6 intended to make the debtor more
7 competitive. Nevertheless, I believe
8 that anyone negotiating in good faith
9 with the debtors, would ultimately have
10 to accept that explanation. And, I
11 think that the debtors' unions, their
12 advisors, and the rank and file, are,
13 first, smart enough to make the
14 argument, the inevitable argument, and,
15 second, smart enough also to understand
16 the debtors' and my response. Another
17 way to say this is, that it appears to
18 me that if I did not approve this AIP
19 today, I would be approving it at some
20 point, because it is reasonable, and I
21 don't really see a logical reason to
22 defer that beyond the inevitable push
23 back that the debtors would receive.
24 But, they would receive that push back
25 inevitably, I believe, at any time. And

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2 it has chosen to bring it on now, and
3 based on this record, it's entitled to
4 it. The other objection, although it's
5 a variation on that theme, I think has
6 more substance to it, which is that this
7 case is still in its early stages and it
8 is not clear what will happen in it. It
9 is particularly not clear to the unions,
10 and the unionized work force, what will
11 happen to them. And it does appear to
12 me, to create a perception of
13 unfairness, to lock in the opportunity
14 for a bonus in that environment. One
15 aspect of the bonus plan, in particular,
16 seems unfair to me in that respect, and
17 that is the aspect that gives the
18 executives the right to a bonus,
19 although a reduced bonus, even if the
20 debtors perform at considerably less
21 than the target level. While, normally,
22 I would not pick out a provision like
23 that, for a plan like this, I think, in
24 this particular context, where the same
25 business plan that is being presented to

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2 the workers as the basis for asking them
3 for concessions is being used as the
4 basis for the bonus targets, it does not
5 seem to me to be fair to award a bonus
6 for performance off of, or worse than,
7 that business plan by 30 percent in this
8 context. That may be something that can
9 be addressed down the road, when the
10 debtors are further along with their
11 negotiations, but it does seem to that,
12 that is locking in a form of certainty
13 beyond an opportunity, which is, I
14 believe, the only way that a bonus plan
15 like this can be presented with
16 justification: to a worker who is being
17 asked to take a substantial reduction
18 that the executive is taking the risk,
19 as well as potentially getting the
20 reward for meeting the target. So, with
21 those two changes, i.e., the change on
22 the audit committee reporting and the
23 elimination of the bonus opportunity for
24 less than performance, I will approve
25 the amended motion.

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2 MR. BUTLER: Your Honor, we
3 will prepare a revised draft order, and
4 send it to chambers on Monday.

5 THE COURT: Okay.

6 MR. BUTLER: That concludes the
7 matter before the court today.

8 (Whereupon this matter was
9 concluded.)

10 (Time noted: 6:50 PM)

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3 I, Pnina Eilberg, hereby certify that
4 the foregoing is a true and correct
5 transcription, to the best of my ability, of
6 the sound recorded proceedings submitted for
7 transcription in the matter of the bankruptcy
8 hearing for except, where as indicated, the Court
9 has modified its bench ruling:

10 DELPHI CORPORATION, ET. AL.

11 I further certify that I am not employed
12 by nor related to any party to this action.

13

14 In witness whereof, I hereby sign this
15 date:

16 February 19, 2006.

17

18

19

20 _____
Pnina Eilberg

21

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